Supreme Court, U.S.
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No. ____

In The Supreme Court of the United States

October Term, 1994

Jack L. Thomas,
Respondent,

v.

D. Grant Peacock,
Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, consistent with Article III of the Constitution and the decision of this Court in *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 30 S. Ct. 601 (1910), a federal court may automatically assert "ancillary" jurisdiction over a separate lawsuit, involving separate facts, filed for the purpose of collecting a prior federal judgment from a party other than the judgment debtor.

2. Whether, under this Court's holdings in *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), and *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 108 S. Ct. 2182 (1988), a court may derive from ERISA, and impose on a nonfiduciary, a substantive ERISA remedy for the collection of a judgment entered pursuant to ERISA in a prior lawsuit.

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PETITION FOR A WRIT OF CERTIORARI

D. Grant Peacock respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a, is reported at 39 F.3d 493. The opinions of the district court are unreported. App., *infra*, at 30a, 54a.

JURISDICTION

The court of appeals entered its judgment on November 4, 1994. Petitioner timely sought rehearing by the Fourth Circuit, and that request was denied on December

2, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a), enumerates the private causes of action available under ERISA. Its text is set forth in the Appendix, *infra*, at 71a.

Section 502(e)(2) of ERISA, 29 U.S.C. § 1132 (e)(2), ERISA's nationwide service of process provision, provides:

> "Where an action under this title is brought in a district court of the United States, . . . process may be served in any other district where a defendant resides or may be found."

28 U.S.C. § 1367 codifies the law of ancillary and pendent federal court jurisdiction. Its text is set forth in the Appendix, *infra*, at 73a.

STATEMENT

A. Overview.

This is a collection action, filed in federal court against Petitioner for the purpose of collecting a judgment obtained against a corporation, Tru-Tech, Inc., in a previous lawsuit in federal court. Petitioner Grant Peacock asserted that the action should be dismissed, among other reasons, because the district court lacked jurisdiction over the dispute. The opinion below observed that there is no diversity jurisdiction here, and that the only potential basis for federal jurisdiction is that the action seeks to enforce a prior federal court judgment.

The Fourth Circuit held that this jurisdictional basis is sufficient—that a federal court has "ancillary jurisdiction" over a separate lawsuit brought for the purpose of collecting a prior federal judgment from a person other

than the judgment debtor from the prior suit. In this holding, the Fourth Circuit joined similar rulings by the Third and Seventh Circuits. These circuit court decisions have treated as a nullity a controlling decision of this Court, and are also in disagreement with decisions from the Fifth and Tenth Circuits, among others.

The original judgment entered against Tru-Tech was based on its obligations as a fiduciary to an ERISA plan, and was obtained in an action under ERISA. Petitioner Peacock was not a fiduciary of the plan in question. The Fourth Circuit nevertheless held Petitioner liable for the judgment against Tru-Tech on a theory of piercing Tru-Tech's corporate veil. By thus imposing liability on a nonfiduciary, and finding in ERISA an extrastatutory mechanism for the enforcement of ERISA judgments, the decision below came into conflict with this Court's recent ERISA jurisprudence.

B. The Prior Lawsuit.

The scene for this case cannot be set without brief reference to the prior related case, *Thomas v. Tru-Tech, Inc.* ("*Tru-Tech*"), the ERISA case in which liability was imposed upon Tru-Tech as a plan fiduciary, but Petitioner Grant Peacock was absolved of liability and expressly held not to be a fiduciary. The instant case is essentially an effort by Respondent Thomas to find a solvent defendant to pay the judgment rendered in *Tru-Tech*.

On the question of Petitioner Peacock's fiduciary status, the Fourth Circuit upheld the district court's conclusion that he was not:

> [T]he district court held that Peacock acted solely in his capacity as Chairman of the Board of Tru-Tech, not as a fiduciary of the Plan. Indeed, the record reveals that Tru-Tech's Board of Directors resolved in a meeting on October 11, 1984, to retain the ten-year cliff vesting schedule. Conceding this, *Thomas insists*

> *that Peacock, as the principal investor, dominated the Board and had de facto power to make these decisions concerning the Plan. But this influence has scant evidentiary support and does not contradict the finding that these decisions were made by the Board, not Peacock acting unilaterally.*

Thomas v. Tru-Tech, Inc., 900 F.2d 256 (table only), 1990 WL 48865 at **3 (4th Cir. Apr. 3, 1990) (unpublished; emphasis added).

C. Proceedings Below in the Instant Case.

1. Before the District Court.

Thus, at the conclusion of *Tru-Tech*, Petitioner Peacock was no longer within the jurisdiction of the federal court. Respondent Thomas filed the instant proceeding against Petitioner—an entirely new lawsuit, with a new caption, a new file number, and entirely different factual allegations—to force Petitioner to pay the judgment entered against Tru-Tech. The Complaint attempted this through a cause of action styled "Piercing the Corporate Veil Under ERISA and Applicable Federal Law." The issue for trial was whether Petitioner Peacock, in his dealings with Tru-Tech *after* the entry of judgment, engaged in activities that improperly removed assets from Tru-Tech.

The district court rejected Petitioner's argument that ERISA does not provide such an independent cause of action as "piercing the corporate veil" (and thus, that ERISA cannot be relied on either for subject matter jurisdiction or for personal jurisdiction by virtue of ERISA's nationwide service of process). App. *infra*, at 50a, 65a.

Instead, the district court accepted the theory that ERISA provides a cause of action for piercing the corporate veil of an ERISA fiduciary to reach its non-fiduciary shareholders. App., *infra*, at 43a-50a. It also held that the corporate veil should not be accorded great significance in an ERISA case, given the "broad, remedial scope" of ERISA. App., *infra*, at 50a. "The congressional intent of ERISA," the district court concluded, "is to hold employers responsible for pension benefits, so that when the corporate form poses a bar to liability, concerns for corporate separateness are secondary to the mandate of ERISA." App., *infra*, at 52a. On this basis, the district court imposed personal liability on Petitioner Peacock for the prior judgment against Tru-Tech.

2. In the Court of Appeals.

The Fourth Circuit affirmed, but not on the ERISA-specific grounds of the district court. Instead, the court of appeals held that an action to pierce the corporate veil of a judgment debtor falls within a federal court's "ancillary jurisdiction"—even if the action is commenced as an entirely separate lawsuit. This conclusion is in direct conflict with an opinion of this Court, as well as recent decisions in several circuits, regarding the extent of a federal court's ancillary jurisdiction.

On the issue of federal jurisdiction, the Fourth Circuit did note that there was no diversity jurisdiction in this case, and "that there is no basis for federal question jurisdiction other than the fact that the suit seeks to enforce a judgment obtained pursuant to ERISA." 39 F.3d at 499 n.6, App., *infra*, at 11a. This one fact was held sufficient, however; the court affirmed, on the basis that this separate suit to pierce Tru-Tech's corporate veil and impose liability on Petitioner was "ancillary" to the federal district court's jurisdiction over the previous lawsuit, *Tru-Tech*. In so holding, the Fourth Circuit relied primarily on this Court's 1867 opinion in *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166 (1867). 39 F.3d at 500, App., *infra*, at 13a. *Riggs* does not deal directly with the issue presented here, but states the proposition that some "proc-

ess subsequent to judgment" is a part of the federal court's power. 73 U.S. (6 Wall.) at 187.[1]

The court of appeals acknowledged to varying degrees three cases that are in direct conflict with its application of ancillary jurisdiction. In *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 30 S. Ct. 601 (1910), which the Fourth Circuit sought to distinguish, this Court held squarely that a case such as this one does not fall within a federal court's ancillary jurisdiction. 39 F.3d at 500, App., *infra*, at 13a. The Fourth Circuit also made passing mention of, but did not analyze, decisions in two other circuits that reach the opposite result from the instant case. 39 F.3d at 501, App., *infra*, at 15a; *see Sandlin v. Corporate Interiors Inc.*, 972 F.2d 1212, 1217 (10th Cir. 1992); *Berry v. McLemore*, 795 F.2d 452, 455 (5th Cir. 1986).

The Fourth Circuit's stated test for the propriety of exercising ancillary jurisdiction was whether the subsequent action is "truly independent" of the prior action. The court gave no weight to the fact that the veil-piercing action is entirely separate from the prior lawsuit on which federal jurisdiction is dependent:

> Without defining the precise contours of when a subsequent litigation is "independent" of a former litigation and judgment, we believe that [Respondent] Thomas' attempt to pierce the corporate veil is not "independent" of the initial litigation herein. As noted above, an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action. *That Thomas opted to file a separate action to pierce Tru-Tech's corporate veil is irrelevant*: the court's subject matter jurisdiction does not turn on whether Thomas pursued the procedurally proper route. . . . [*T*]*his is, at bottom, a proceeding the goal of which is to collect the judgment earlier obtained by the plaintiff class. There is, in short, simply no practical reason to treat this litigation as separate from the initial litigation.*

39 F.3d at 501-02, App., *infra*, at 16a (citations and footnotes omitted; emphasis added). In other words, the court below concluded that the instant action was not "independent," and that ancillary jurisdiction was therefore proper, for the simple reason that the goal of this action "is to collect the judgment" from the prior action.

After concluding that federal jurisdiction was proper, the Fourth Circuit proceeded to fashion an ERISA remedy for piercing the corporate veil. Having noted that veil piercing is "substantive" law, 39 F.3d at 499, App., *infra*, at 12a, the court held that "ERISA preempts any state law of veil-piercing," 39 F.3d at 503, App., *infra*, at 20a. It expressly rejected Petitioner's argument that *Mackey* means there is no *ERISA* remedy for judgment enforcement, *id.*, (although there may be one under state law) and thus that ERISA's nationwide service of process provision, 29 U.S.C. § 1132(e)(2), could not be used to reach Petitioner. The prior judgment was accordingly imposed on Petitioner under the auspices of ERISA. The court "adopt[ed] the liberal veil-piercing standard enunciated by the First Circuit in *Alman* [*v. Danin*, 801 F.2d 1 (1st Cir. 1986)] for use in ERISA actions." 39 F.3d at 504, App., *infra*, at 23a. It quoted with approval a long passage from *Alman*, which states among other things that ERISA "cannot be said to attach great weight to corporate form." 39 F.3d at 504, App., *infra*, at 21a.

[1] The full text quoted by the Fourth Circuit states:

> It is black letter law that
>
> the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. . . . Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.

REASONS FOR GRANTING THE PETITION

I. SUMMARY.

In the broadest terms, there are two reasons for the Court to take this case. First, it is in direct conflict with this Court's decisions in *Beecher* and in *Kokkonen v. Guardian Life Insurance Co.*, 114 S. Ct. 1673 (1994) over the scope of federal ancillary jurisdiction. It also broadens an existing conflict among a number of circuits over the same point; notably, some of the circuit courts agreeing with the Fourth Circuit have reached their decisions by expressly declining to follow *Beecher*. The issues presented are important ones; the decision below has the potential to expand federal court jurisdiction dramatically in all areas. It would open the federal courts to any separate lawsuit filed for the purpose of collecting a prior federal judgment. The issues giving rise to these conflicts are cleanly presented here, and the Court should resolve this important question of federal jurisdiction and reaffirm the vitality of *Beecher*.

Second, the decision below reaches a result that is contrary to this Court's decisions in two ERISA cases, *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), and *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 108 S. Ct. 2182 (1988). Taken together, these cases make it clear that ERISA does not provide a specific remedy for the collection of ERISA judgments, and that ERISA is in general a "comprehensive and reticulated statute," *Mertens*, 113 S. Ct. at 2066, and accordingly that theories of liability not included in the statute should not be created by the judiciary, 113 S. Ct. at 2071-72. Yet the decision below does precisely what these decisions forbid. It derives from ERISA a means for the enforcement of an ERISA judgment on a theory of recovery not spelled out in ERISA, against a person not identified by ERISA as liable. (Indeed, against a person previously held *not* to be liable under ERISA.) Because

personal jurisdiction could be had *only* pursuant to ERISA's nationwide service of process provision, 29 U.S.C. § 1132(e)(2), treatment of the remedy as arising under ERISA was indispensable to the result below. This result contributes to the existing confusion among the circuit courts of the respect to be paid to the corporate form in ERISA cases. The Court should bring this matter back in line with its precedents and the statutory balance struck by Congress.

II. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *BEECHER* AND *KOKKONEN* AND WITH DECISIONS OF SEVERAL OTHER CIRCUITS. IT HAS THE POTENTIAL TO GREATLY EXPAND THE SCOPE OF FEDERAL JURISDICTION.

The fundamental question of federal jurisdiction presented here is the availability of ancillary jurisdiction over a separate lawsuit, involving new facts, filed to collect a prior federal court judgment from a party other than the judgment debtor.[2] Review is appropriate because there is a substantial split of authority on this point, which has called into question one of this Court's precedents.

The lower court cases that have held that ancillary jurisdiction does not exist in such a circumstance, or which have enunciated principles plainly precluding such an action, include *Sandlin*, 972 F.2d 1212, 1217 (10th Cir. 1992); *Berry*, 795 F.2d 452, 455 (5th Cir. 1986); *Sederquist v. Court*, 861 F.2d 554, 557-58 (9th Cir. 1988); *Redding Ford v. California State Board of Equalization*, 722 F.2d 496, 498 (9th Cir. 1983); *Fidelity & Casualty Company v. Reserve Ins. Co.*, 596 F.2d 914, 918 (9th

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[2] There is no alternative basis for jurisdiction here. As the court below noted, it is "undisputed that there is no diversity of citizenship in this action, and that there is no basis for federal question jurisdiction other than the fact that the suit seeks to enforce a judgment obtained pursuant to ERISA." 39 F.3d at 499 n.6; App., *infra*, at 11a n.6.

Cir. 1979); *National Westminster Bank U.S.A. v. Cheng*, 751 F. Supp. 1158, 1160 (S.D.N.Y. 1990) (relying on *Manway Constr. Co. v. Housing Auth. of the City of Hartford*, 711 F.2d 501, 504 (2d Cir. 1983)).

Other circuits have disagreed, holding or implying that ancillary jurisdiction does exist in such a case. *Argento v. Village of Melrose Park*, 838 F.2d 1483, 1487-90 (7th Cir. 1988) (followed in *Sullivan v. Hochfelder*, 834 F. Supp. 1036, 1038 (N.D. Ill. 1993), albeit with mention of the problem of exercising ancillary jurisdiction in a separate action); *Skevofilax v. Quigley*, 810 F.2d 378, 383-85 (3d Cir. 1987) (*en banc*); *Blackburn Truck Lines v. Francis*, 723 F.2d 730, 732 (9th Cir. 1984).

The appropriateness of review is heightened because the decision below is in direct conflict with this Court's decision in *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 30 S. Ct. 601 (1910). Moreover, two of the circuits agreeing with the Fourth Circuit have directly questioned the continuing vitality of *Beecher*. Before describing the circuit split, we therefore turn to *Beecher*, and to this Court's recent decision in *Kokkonen*, which also directs a different result from the one reached below.

A. This Court Should Grant Certiorari to Reaffirm the Validity of its Controlling Opinion in *Beecher*, Which Has Come into Question.

In *Beecher*, a judgment creditor brought an action to impose liability for a prior patent judgment on the directors of the corporate judgment debtor. The creditor accused the directors of taking actions with the purpose and effect of rendering the company insolvent in the event of a judgment against it. In his opinion for the Court, Justice Holmes was careful to emphasize that the second action did not deal with the patent (just as the instant case does not contain any allegations regarding the ERISA plan) but had to do only with the existence of the judgment.

Accordingly, the Court ruled that the attempt to impose liability on the directors was "of course" not "ancillary to the judgment in the former suit." 217 U.S. 497, 30 S. Ct. at 602.

Beecher is plainly controlling here. The allegations and issues are the same below and in *Beecher*. The court below sought to distinguish *Beecher* on the timing of the alleged wrongs by the individual defendants in the two cases, but the net effect of this is to emphasize that Petitioner Peacock's asserted wrongdoing was entirely divorced in time from the ERISA wrong for which Tru-Tech was held liable. 39 F.3d at 501, App., *infra*, at 15a. This break in time highlights the absence of the "common nucleus of operative fact" between *Tru-Tech* and the instant case that would make the two part of the same constitutional "case or controversy."[3] *See* 39 F.3d at 503 n.14, App., *infra*, at 19a n.14.

Two circuit courts that have reached conclusions similar to the one below have said that *Beecher* should be treated as a nullity. In *Argento*, a divided panel of the Seventh Circuit approved an exercise of ancillary jurisdiction over a separate lawsuit to impose liability on parties held not liable in the prior suit. They declined to follow *Beecher*: "That case, decided over 75 years

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[3] As we discuss *infra* in describing *Kokkonen*, it is clear that constitutional and statutory limits on federal court power apply to exercise of ancillary and pendent jurisdiction. *See also Owen*, 437 U.S. at 372, 98 S. Ct. at 2401. The accepted constitutional test is whether there is a "common nucleus of operative fact" between the claim sought to be brought before the court and the accompanying federal claims. Without this "common nucleus," the matters are not part of the same constitutional "case."

This standard has recently been codified, without any relevant impact on the inquiry to be undertaken. 28 U.S.C. 1367, App., *infra*, at 73a, allows the exercise of "supplemental" jurisdiction over claims that "form part of the same case or controversy under Article III" of the Constitution as a case already properly in federal court.

ago, is three paragraphs long containing a conclusion, but virtually no discussion. It has rarely been cited as precedent." 838 F.2d at 1488. The dissent in *Argento* criticized the majority for reaching a decision "directly contrary" to *Beecher*. 838 F.2d at 1501.

A similar disagreement over the vitality of *Beecher* erupted in the Third Circuit in *Skevofilax*. The majority of the *en banc* court declined to follow *Beecher*, calling it a "delphic pronouncement" and dismissing the opinion because it did not expressly claim to "serve as a pronouncement on the constitutional limits of ancillary jurisdiction." 810 F.2d at 385 n.4. The dissent countered that *Beecher* did have precedential value, and that it should have controlled. 810 F.2d at 392-93.

Although not directly controlling, the analysis of this Court's unanimous opinion last term in *Kokkonen* clearly indicates that *Beecher* is good law and that the decision below was incorrect. *Kokkonen* considered whether a federal court has ancillary jurisdiction to enforce a settlement agreement from a prior federal case. After noting that federal courts have limited jurisdiction, possessing "only that power authorized by Constitution and statute," 114 S. Ct. at 1675, the Court concluded there is no automatic federal jurisdiction over a claimed breach of a settlement agreement. The factual issues involved in the two cases were plainly distinct, and the court's ability to function was not "imperiled by the alleged breach." 114 S. Ct. at 1677. The suit, in short, "involve[d] a claim for breach of a contract," and "automatic jurisdiction over such contracts is in no way essential to the conduct of federal-court business." *Id.* This analysis suggests that *Beecher* is right and the result below is wrong. There is no common nucleus of operative fact here, and the alleged wrong is not one that imperils the operation of the federal courts such that "automatic jurisdiction" over such a claim is "essential."

The instant case presents clearly the issue of the continuing vitality of *Beecher*. This is an attempt (i) in a second, separate lawsuit (ii) to invoke facts not in issue in the prior lawsuit [4] (iii) in order to hold liable a person not already within the federal court's jurisdiction.[5] Under *Beecher*, under the constitutionally mandated ancillary jurisdiction analysis contained in *Owen* and *Kokkonen*, and under various circuit court authorities we will describe below, ancillary jurisdiction should not have been exercised here. In light of the growing tendency to disregard *Beecher*, the Court should take this opportunity to make it plain that *Beecher*, and Article III principles in general, govern this case.

B. The Decision Below Broadens a Substantial Split of Authority Over the Scope of Federal Ancillary Jurisdiction.

1. *Cases Disagreeing with the Fourth Circuit.*

We provided at the beginning of this section a list of many of the federal court decisions following *Beecher* and

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[4] This issue is well presented here, as the Fourth Circuit several times relied on its conclusion that the facts in the instant case were different from the facts at issue in the original *Tru-Tech* litigation. *See* 39 F.3d at 501, App., *infra*, at 15a (distinguishing *Beecher* because alleged wrongs here were directed to "already-extent [*sic*] judgment"; *id.* n.10, App., *infra*, at 16a n.10 (distinguishing *Sandlin* on basis that this case involves "conduct by Peacock occurring after the judgment in the initial litigation"); *id.* at 503 n.14, App., *infra*, at 19a n.14 (activity leading to conclusion of veil-piercing here occurred *"after* the activity pursuant to which the corporation is deemed to have breached its ERISA fiduciary duties").

[5] Courts considering the issue have recognized that parties absolved of liability in a prior action should be treated as strangers to the judgment in that action for purposes of any subsequent action attempting to impose liability on them. *Argento*, 838 F.2d at 1488 n.7; *Skevofilax*, 810 F.2d at 384-85 (treating township as "nonparty to the original lawsuit" for purposes of imposing liability on township for individual officers' liability; *Berry*, 795 F.2d at 455 n.2.

in conflict with the result below. We describe some of those cases in more detail here.

Many of these opinions have acknowledged the passage from *Riggs* relied on by the Fourth Circuit, *see supra* note 1, which states that a federal court's jurisdiction continues after the entry of judgment, but have concluded that this holding does not mean that a federal court can do anything it pleases, to anyone it pleases, in the name of enforcing a judgment. *See Berry*, 795 F.2d at 455 (post-judgment jurisdiction described in *Riggs* "is limited to those actions that a court may take in that same action"); *National Westminster Bank*, 751 F. Supp. at 1160 (in construing *Riggs*, "where a party seeks to invoke ancillary jurisdiction to protect a judgment of the court, there must be a transactional relationship between the claims predicated on federal jurisdiction and the claims to be piggy-backed into the federal court" (internal quotation omitted)).

Prior to the decision below, the Tenth Circuit had most recently dealt with this matter. That court faced the precise issue presented by the present case—an attempt by a successful plaintiff to enforce his judgment against alleged alter egos of the judgment debtor—in *Sandlin*, 972 F.2d 1212 (10th Cir. 1992). Calling the precedents "largely consistent," the *Sandlin* court stated that "[w]hen a party asserts a postjudgment claim against a nonparty *not arising out of the operative facts that produced the original judgment, an independent basis for federal jurisdiction must exist.*" 972 F.2d at 1216 (emphasis added). Although noting that *Beecher* has recently been criticized as "dated and for its lack of exposition," the Tenth Circuit read *Beecher* "as saying that when postjudgment proceedings seek to hold nonparties liable for a judgment on a theory that requires proof on facts and theories significantly different from those underlying the judgment, an independent basis for federal jurisdiction must exist. So read, the opinion seems both consistent with most modern

court decisions and controlling upon us." 972 F.2d at 1217.

National Westminster Bank, supra, also involved an attempt by a judgment creditor to collect his judgment from principals of the corporate debtor by "piercing the corporate veil." 751 F. Supp. at 1159. The court declined ancillary jurisdiction in this separately filed lawsuit, because there was no nexus between the original claim and the veil-piercing action. "[P]etitioner's theories of fraudulent conveyance and piercing the corporate veil are removed from the original breach of contract action . . . . Petitioner's claims involve investigation into the facts of how the corporations at issue were run . . . ." 751 F. Supp. at 1160. The principle relied on in this case was drawn directly from the Second Circuit's opinion in *Manway Construction Co.*, 711 F.2d 501, 504 (2d Cir. 1983), which was also relied on by *Sandlin*. Although *Manway* involved different facts, its controlling principle is contrary to the ruling by the Fourth Circuit below, and the Second Circuit should be counted among the circuits in direct conflict with the Fourth Circuit's ruling.

In Berry, 795 F.2d 452, the Fifth Circuit refused to exercise ancillary jurisdiction over an attempt to collect a judgment from the alleged indemnitors of the judgment debtor. The *Berry* court first concluded that the two actions did not share a common nucleus of fact, noting that plaintiff's first action "arose out of an alleged violation of his constitutional rights," while the second involved a contract. "[T]he alleged obligations of the Town and NHI are completely independent of the primary judgment against McLemore." 795 F.2d at 455. The court concluded: "We can find no case where a court held that it had ancillary jurisdiction to consider claims in a *new and independent action* merely because the second action sought to satisfy or give additional meaning to an earlier judgment." *Id.*

Several decisions by the Ninth Circuit fall into this line of authority.[6] *Sederquist* holds that ancillary jurisdiction will not extend to "a separate case against different defendants." 861 F.2d at 558; *see also Redding Ford*, 722 F.2d at 498 (9th Cir. 1983) ("[a]ncillary jurisdiction cannot be extended beyond the claims asserted in one action"); *Fidelity & Casualty Company*, 596 F.2d at 918 (9th Cir. 1979) ("Whatever the current parameters of ancillary jurisdiction the doctrine has never extended beyond claims asserted in one action.").[7]

2. *Cases Agreeing with the Fourth Circuit.*

There are also courts that have agreed broadly with the ruling below. In our discussion of *Beecher* above, we discussed two of these cases, *Argento*, 838 F.2d 1483, and *Skevofilax*, 810 F.2d 378, which regard *Beecher* as having fallen into desuetude.

The other case agreeing with the result below reflects confusion within a circuit. In an opinion decided without oral argument less than one month after *Redding Ford*,

[6] As we discuss *infra*, there is one contrary opinion in the Ninth Circuit on this issue, but the majority of Ninth Circuit cases disagree with the Fourth Circuit.

[7] The Ninth Circuit cases do not involve attempts to enforce judgments, but their rationales nevertheless conflict directly with the result below. This highlights the fact that the ancillary jurisdiction cases involve two approaches, which complement one another, and which both disagree with the result below. One approach emphasizes that the facts involved in the veil-piercing analysis will typically be unrelated to the facts giving rise to substantive liability; absent a common nucleus of operative fact, there can be no ancillary jurisdiction. Other cases have not reached this stage of analysis, because they have held that ancillary jurisdiction can never extend to a second lawsuit; a federal court's power to hear ancillary matters stops at the boundaries of the suit over which it has original jurisdiction. Both issues are presented in this case, since it involves *both* a separate lawsuit *and* a clear disjunction of the relevant facts in the two cases. *See supra* note 4.

supra, the Ninth Circuit took a position inconsistent with its own precedents. *Blackburn Truck Lines v. Francis*, 723 F.2d 730 (9th Cir. 1984), was a separate lawsuit to collect a judgment in a freight charges case from the alleged alter egos of the bankrupt original defendants. Without citation to *Beecher* or the Ninth Circuit precedents mentioned above that expressly hold that ancillary jurisdiction will not extend to an entirely separate lawsuit, the *Blackburn* panel concluded that the federal courts did have ancillary jurisdiction over such a matter.

This is an area that is beset with considerable confusion; the various circuits employ various methods of analysis, with various results, and pay various amounts of deference to this Court's decision in *Beecher*. This case squarely and cleanly presents these issues, and the Court should take this opportunity to provide unity and guidance on this question.

Nor are the stakes trivial. The rule enunciated by the Fourth Circuit would open the federal courts to any separate lawsuit with the stated purpose of imposing a judgment entered in a federal court on a party not initially held liable for that judgment. Although the Fourth Circuit saw "no practical reason" not to exercise jurisdiction over such a matter, 39 F.3d at 502, App., *infra*, at 17a, such a rule would increase the load of federal cases without any efficiency advantages; since, by definition, these new cases involve entirely new issues, the federal courts that handled the prior actions have no advantage over the state courts in disposing of them. For these reasons as well, review by this Court is appropriate.

III. THE DECISION BELOW, BY FASHIONING AN ERISA REMEDY FOR ENFORCEMENT OF AN ERISA JUDGMENT, AND IMPOSING IT ON ONE HELD NOT TO BE A FIDUCIARY, CONFLICTS WITH THIS COURT'S RECENT DECISIONS INTERPRETING ERISA.

The decision below is in conflict with this Court's cases in *Mertens* and *Mackey*. It violates their teachings by fashioning a substantive ERISA remedy for the collection of judgments, and by applying that remedy to one who would not be held liable within the four corners of the ERISA statute. The question of whether there is an *ERISA* remedy in this case is of particular importance because, regardless of subject matter jurisdiction, the only basis for personal jurisdiction over Petitioner Peacock in South Carolina was ERISA's nationwide service of process provision. If Respondent has only a state law remedy for his wrong, he cannot sue Mr. Peacock in South Carolina. App., *infra*, at 59a.

The result also highlights considerable lower court confusion over the proper respect to be shown to corporate form in ERISA cases. Review by this Court is needed to establish the effect of its precedents and to give guidance on the deference to be given corporate form.

A. In *Mertens*, This Court Held That Courts Should Not Fashion ERISA Remedies Not Expressly Created by Congress. The Court Below Derived Just Such a Remedy from ERISA.

In *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), the Supreme Court held that ERISA does not authorize suits for monetary relief by plan participants against a *non*fiduciary. Observing that the only provision of ERISA allowing suit against nonfiduciaries provides for "equitable relief" only, the Court declined to expand the express provisions of ERISA to allow monetary recovery as well as equitable relief against a nonfiduciary.

After noting that ERISA is a "comprehensive and reticulated statute," 113 S. Ct. at 2066 (internal quotations omitted), this Court stated its own "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 113 S. Ct. at 2071-72 (internal quotations omitted). In closing, the Court rejected an invitation to "give a strained interpretation to [ERISA] in order to achieve the [claimed] 'purpose of ERISA to protect plan participants and beneficiaries.'" 113 S. Ct. at 2071. The Court stated that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text," especially with respect to "ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests— not all in favor of potential plaintiffs." *Id.; see also Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 105 S. Ct. 3085, 3092 (1985) ("carefully integrated" enforcement scheme of ERISA is "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly").

The Fourth Circuit treated the veil-piercing action brought by Respondent as "a substantive rule of liability." 39 F.3d at 499, App., *infra*, at 12a. It held that ERISA "preempts any state law of veil-piercing" and provides the rule of law for such an action. 39 F.3d at 503, App., *infra*, at 20a. By thus allowing a substantive cause of action, nowhere provided for in ERISA, to proceed as an ERISA action, the court below did precisely what *Mertens* said it should not.

B. *Mertens* is Also Violated by the Imposition of a Substantive ERISA Remedy Against a Person Adjudged Not to be a Fiduciary.

In *Tru-Tech*, the district court held and the Fourth Circuit affirmed that Grant Peacock was not a fiduciary of the ERISA plan at issue. As this Court explained in

Mertens, ERISA establishes a broad definition of fiduciary that "expand[s] the universe of persons subject to fiduciary duties—and to damages"—beyond the common law, which limited the reach of fiduciary duty to "formal trusteeship." 113 S. Ct. at 2071. The Court relied on this expansive definition of fiduciary in declining to further expand liability to non-fiduciaries under ERISA. The Court would not disturb "the balance . . . that the text adopted by Congress has struck." 113 S. Ct. at 2072.

In other words, Congress used the term "fiduciary" to describe precisely those persons and entities against whom ERISA provides remedies for breaches. The ruling below upsets this statutory balance by providing an ERISA remedy against a person expressly held not to be a fiduciary.

The rationales offered below for this departure from ERISA and this Court's guidance—that such a step was necessary to vindicate ERISA's "broad, remedial scope," App., *infra*, at 50a, and that ERISA "cannot be said to attach great weight to corporate form," 39 F.3d at 503, App., *infra*, at 22a—simply miss the point. The "remedial purpose" of ERISA, be it broad or narrow, is incorporated into the fiduciary liability standard and the "balance" struck by Congress. Similarly, fiduciary liability defines precisely the degree to which the court may reach behind the corporate veil. If a person "exercises any discretionary auhority or discretionary control" with respect to an ERISA plan, 29 U.S.C. § 1002(21)(A) then he or she can be held liable, regardless of the shielding presence of a corporation. An ERISA-based remedy that goes beyond this standard is at odds with the statute and with *Mertens*.

By treating the veil-piercing claim as arising under ERISA, the court below went beyond the statute, and was able to find personal jurisdiction over Petitioner Peacock where none would otherwise exist.

C. By Fashioning a Separate, Substantive ERISA Remedy for the Enforcement of ERISA Judgments, the Fourth Circuit also Violated this Court's Decision in *Mackey*.

In *Mackey v. Lanier Collection Agency & Service*, 486 U S. 825, 833, 108 S. Ct. 2182, 2187 (1988), the Court explained that "ERISA does not provide an enforcement mechanism for colletcing judgments won" in civil enforcement actions under ERISA's 29 U.S.C. § 1132. "Consequently," the Court concluded, "state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA[.]" 486 U.S. at 834, 108 S. Ct. at 2187-88. Once the judgment is in hand, an ERISA judgment debtor is no different from any other judgment debtor.

Mackey plainly applies here, for there can be no doubt that Respondent Thomas's intent in bringing this action was to collect the prior judgment.[8] As the Fourth Circuit

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[8] To be sure, the facts of *Mackey* are different from those of this case, but the holding of *Mackey* is clear and its import is unmistakable—ERISA does not provide a separate substantive remedy for the collection of ERISA judgments. Moreover, the Fourth Circuit's divergence from *Mackey* is made manifest by the two opinions' inconsistent rulings on the matter of ERISA preemption of collection actions.

Mackey involved two issues, both of which arose from an attempt by a Georgia collection agency to garnish welfare plan benefits to collect money judgments. In the first portion of its opinion, the *Mackey* Court struck down a Georgia statute that specifically exempted ERISA plans from "the process of garnishment," on the grounds that the law made "reference to" an ERISA plan and thus was preempted by ERISA. 486 U.S. at 829-30, 108 S. Ct. at 2185-86.

The second portion of the opinion went on to consider whether the entire Georgia garnishment procedure was preempted by ERISA. It was in this context that the Court concluded that ERISA does not provide its own mechanism for the enforcement of judgments; hence, the Court held that state law mechanisms must be used and that the garnishment statute was not preempted.

stated plainly in its opinion, "this is, at bottom, a proceeding the goal of which is to collect the judgment earlier obtained by the plaintiff class." 39 F.3d at 501, App., *infra*, at 16a.

Mackey reinforces, in the specific context of actions to enforce ERISA judgments, the general principles of *Mertens* that courts are not free to create new ERISA remedies. Nevertheless, the opinion below provided Respondent with a federal substantive remedy to assist him in haling Petitioner into court and collecting the ERISA judgment. *Mackey* teaches that there is no such remedy.

D. The Decision Below Contributes to a Broad and Continuing Confusion over the Respect to be Accorded the Corporate Veil in ERISA Litigation. The Court's Guidance is Needed on this Question.

In the context of breach of fiduciary duty, a number of circuits have held, as the Fourth Circuit did below, that ERISA has little regard for the corporate form, and that the corporate veil of a corporate fiduciary may be breached almost at will to reach a solvent shareholder or director. The leading case in this area, relied on heavily below, is *Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986); *see also Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987).

On the other hand, ERISA cases involving suits against employers for delinquent plan contributions have taken a much more cautious approach to the corporate veil. Although many of these cases allude to the possibility of veil-piercing in the appropriate circumstance, they do not suggest that the corporate form can be tossed aside whenever convenience or the "broad remedial purpose" of ERISA so demand. Indeed, these cases point out that

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486 U.S. at 830-40, 108 S. Ct. at 2186-91. This is *precisely contrary* to the holding of the Fourth Circuit below that ERISA does "preempt[] any state law of veil-piercing" in the context of collection of judgments. 39 F.3d at 503, App., *infra*, at 20a.

Congress could have imposed broader ERISA liability on corporate insiders had it chosen, but that it did not. *See, e.g., International Bhd. of Painters v. George A. Kracher, Inc.*, 856 F.2d 1546, 1550 (D.C. Cir. 1988) (declining to hold principal shareholder and chief officer liable for corporation's ERISA contributions; "Limited liability is a hallmark of corporate law. Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in the legislative history."); *Connors v. P&M Coal Co.*, 801 F.2d 1373, 1376 (D.C. Cir. 1986) (rejecting "interest and control" test for imposition of individual liability for corporate obligations; noting that such a lowered standard would "discourage future participation in multiemployer pension plans"); *Operating Engineers Pension Trust v. Reed*, 726 F.2d 513, 515 (9th Cir. 1984) (no special standard of veil piercing set forth in employer contribution case).

The decision below highlights the divergence of views among the circuits as to the respect to be paid to the corporate form in ERISA actions; this divergence shows itself in a comparison of fiduciary breach and employer contribution cases, although there is no statutory or policy difference in the two areas that would justify such different degrees of deference to corporate form. Because of the importance of these issues, and because of the substantial disincentive to provision of ERISA plans by employers that the liberal rule of veil-piercing enunciated below creates, the Court should take this case to clarify the rules under which ERISA liability may be imposed on corporate shareholders or managers.

CONCLUSION

Review of the decision below is necessary to end the confusion regarding the scope of the federal courts' ancillary jurisdiction, and to address the important ERISA issues presented here. Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to consider the questions presented by this case.

Respectfully submitted,

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March 1, 1995

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 92-2524, 93-1394 and 93-1469

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs similarly situated,

Plaintiff-Appellee,

v.

D. GRANT PEACOCK,

Defendant-Appellant,

and

ALAN H. FINEGOLD,

Defendant.

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs, similarly situated,

Plaintiff-Appellee,

v.

D. GRANT PEACOCK,

Defendant-Appellant,

and

ALAN H. FINEGOLD,

Defendant.

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs, similarly situated,

Plaintiff-Appellee,

v.

TRU-TECH, INC.; D. GRANT PEACOCK,

Defendants-Appellants,

and

GRANT PEACOCK AND COMPANY, INC.; CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Defendants.

Argued May 9, 1994

Decided Nov. 4, 1994

Before RUSSELL and WIDENER, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

Affirmed in part and vacated and remanded in part by published opinion. Judge RUSSELL wrote the opinion, in which Judge WIDENER and Senior Judge CHAPMAN joined.

OPINION

DONALD RUSSELL, Circuit Judge:

Jack L. Thomas ("Thomas"), a former employee of Tru-Tech, Inc. ("Tru-Tech"), brought a suit under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, on behalf of a class of former Tru-Tech employees against Tru-Tech and D. Grant Peaccok ("Peacock"), an officer and shareholder of Tru-Tech. The district court held for the plaintiff class as against Tru-Tech, but held Peacock not liable as a

plan fiduciary. *Thomas v. Tru-Tech, Inc.*, No. 87-2243-3, 1988 U.S.Dist. LEXIS 15929, 1988 WL 212511 (D.S.C. Nov. 28, 1988). On appeal, we affirmed the district court's judgment in all respects. *Thomas v. Tru-Tech, Inc.*, 900 F.2d 256 (4th Cir.1990) (unpublished disposition; full text reported at 1990 WL 48865).

Thomas then brought suit, purportedly on behalf of the plaintiff class certified in the earlier suit,[1] against Peacock, individually, and against Peacock's attorney, Alan H. Finegold ("Finegold"), seeking to collect the earlier judgment. Among various theories for recovery, Thomas sought to pierce Tru-Tech's corporate veil and reach Peacock. The district court rejected Thomas' claim against Finegold, but allowed plaintiffs to recover as against Peacock based upon their veil-piercing theory. *Thomas v. Peacock*, No. 7:91-3843-21, 1992 U.S.Dist. LEXIS 18749 (D.S.C. Oct. 28, 1992). Peacock appeals. We affirm.

Peacock also appeals the district court's assessment of attorneys' fees against him with respect to both litigations pursued by Thomas. We vacate the award of attorneys' fees and remand for further proceedings.

I.

In August of 1987, Thomas, on behalf of a class of similarly situated former Tru-Tech employees, filed suit against Tru-Tech and Peacock seeking payment of benefits due under Tru-Tech's pension plan (the "initial litigation"). The complaint raised numerous claims for relief, including breach of fiduciary duty under ERISA. The district court found Tru-Tech, but not Peacock, to be a plan fiduciary; it further found that Tru-Tech had breached

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[1] Thomas describes this suit as a continuation of the prior class action and, accordingly, asserts that this suit is also brought on behalf of the class. As discussed *infra*, Peacock disputes this assertion.

its fiduciary duties. On appeal, we affirmed the district court in all respects.[2]

Thomas subsequently sought to execute judgment against Tru-Tech in Pennsylvania, but was unsuccessful. Thomas then brought the present suit against Peacock, individually, and against Peacock's attorney, Finegold, on theories of civil conspiracy, fraudulent transfer of assets, and corporate veil-piercing under ERISA. The district court approved of plaintiffs' attempt to pierce Tru-Tech's corporate veil and determined that plaintiffs were entitled to collect from Peacock their earlier judgment against Tru-Tech; the court otherwise rejected plaintiffs' claims. Peacock appeals.

II.

In 1981, Rockwell International decided to sell the textile machinery parts manufacturing business of its Draper Division; this business was conducted at two plants, one in Marion, South Carolina, and the other in Beebe River, New Hampshire. A Delaware corporation named Tru-Tech was organized for the purpose of acquiring this business. Tru-Tech maintained an office in Spartanburg, South Carolina; Bill Wilcock ("Wilcock") was appointed its president and chief executive officer. A partnership named Marion Limited Partners ("Marion LP") was established for the purpose of purchasing the Marion, South Carolina, plant from Rockwell International and leasing it to Tru-Tech.

Among the investors in Tru-Tech was appellant Peacock. Peacock was the sole stockholder and director of Peacock, Williams & Company ("PW & C").[3] Peacock

[2] We summarized the facts underlying the initial litigation in our earlier opinion, *see* 1990 WL 48865, at *1-*2.

[3] In fact, PW & C was first called D. Grant Peacock & Company, and then Peacock, Williams & Company; it subsequently reverted to its original name. For ease of reference, we refer to it throughout our opinion as "PW & C."

was a CPA and a lawyer who also served as a partner in Marion LP. Marion LP's sole general partner, however, was Wilcock.

Despite high hopes, Tru-Tech quickly fell on hard times.[4] When, by September of 1983, Tru-Tech had already lost a substantial sum of money, Wilcock was replaced by John H. Blackburn ("Blackburn"), previously Tru-Tech's vice president of operations. When Tru-Tech's board determined that it was not viable for Tru-Tech to continue in business, it became Blackburn's responsibility to liquidate Tru-Tech's assets.

In 1985, Tru-Tech relocated its offices to space rented by PW & C in Pittsburgh, Pennsylvania. Timothy H. Williams ("Williams"), PW & C's president, assumed the role of Tru-Tech's executive vice president, treasurer and secretary. From late 1986 through late 1988, PW & C billed Tru-Tech for incidentals such as telephone, travel,

[4] The district court noted:

> The promoters and founders of Tru-Tech expected the business to derive substantial revenue primarily from two sources. First, they expected to continue supplying parts to Rockwell's Draper Division which manufactured looms. Second, they believed that Tru-Tech had purchased the tooling for Draper parts and that they could sell these parts on the open market. Unfortunately, their expectations did not come to fruition and the business failed.
>
> Despite the general sluggishness in the textile industry at the time, the demise of Tru-Tech can be attributed to two events that occurred simultaneously. First, within six months of Tru-Tech's purchase of Rockwell's Draper parts manufacturing business, Rockwell sold its Draper Division to another group of investors who immediately reduced inventories, thus severely reducing orders Tru-Tech expected to fill. Second, the "new" Draper filed suit against Tru-Tech alleging that Draper, not Tru-Tech, had the tooling rights for Draper parts. It was determined subsequently that Draper had in fact retained these rights, and it was at this point that Tru-Tech's potential for profit was eliminated.

1992 U.S.Dist. LEXIS 18749, at *3-*4.

entertainment, legal, postal and office supply expenses. Peacock testified that, at that time: "We ha[d]n't been keeping the accounting records . . . for Tru-Tech since it it had no employees." J.A. 345.

By February of 1986, Tru-Tech had managed to sell all of its productive assets in South Carolina. Operations at the Beebe River Plant in New Hampshire ceased in June of 1986 and management sought to liquidate the assets at that plant to reduce Tru-Tech's financial liabilities. Despite this effort, Tru-Tech's negative net worth continued to increase from $893,676.00 on September 30, 1986 to $1,376,888.00 by September 30, 1990.

As Tru-Tech's troubles continued to mount, Peacock took it upon himself to "buy out" other investors who, purportedly, could less well withstand the impact of Tru-Tech's financial downturn than could he. As a result, by 1987, Peacock controlled in excess of 70% of Tru-Tech's stock. This domination continued until 1990,[5] when, on Finegold's advice, Peacock sold 724,980 shares to Williams and Blackburn for $200 in order to bring his holdings below the 50% mark. Moreover, from March 1988 until February 1990 and, effectively, until Tru-Tech's final dissolution in May 1990, Peacock served as the company's sole director.

Peacock testified that, following the suspension of Tru-Tech's operations, in July 1986, Blackburn was placed on PW & C's payroll for the purpose of "wrapping-up Tru-Tech's affairs." For this service and for the rent for a portion of PW & C's office in Pittsburgh, PW & C billed Tru-Tech $10,000 each month; this liability eventually grew to more than $110,000. PW & C issued invoices to Tru-Tech which described the $10,000 a month charge as levied for the services rendered by Blackburn, an engineer by trade, as having been billed for "FINANCIAL CONSULTING SERVICES." *E.g.*, J.A. 443. This liability was not long maintained on PW & C's books, however, since, according to an August 3, 1989, memorandum to Williams, "the management fee receivable of [approximately] $110,000 was written off in the year ended 1/31/87." J.A. 593. Nevertheless, as described below, Tru-Tech receivables were subsequently transferred from Tru-Tech to PW & C and to other Peacock-affiliated entities, purportedly in consideration for this liability owed PW & C by Tru-Tech.

[5] Although the stock certificates exhibit dates in 1987, they were not forwarded to Blackburn for his signature until 1990.

On November 28, 1988, as described above, the district court entered judgment in favor of the plaintiff class against Tru-Tech, which timely filed its notice of appeal, leaving Tru-Tech beset by numerous large liabilities, including the *Thomas* judgment, some $50,000 owed to PW & C and approximately $350,000 owed to Peacock individually. After discussions with Peacock concerning the *Thomas* judgment against Tru-Tech, Finegold, by letter dated March 2, 1989, advised Peacock:

> I see no reason for any payment with regard to the Thomas litigation unless and until the judgment becomes final and constitutes a lien on real estate held for sale. As I understand the situation, the corporation owns no real estate in South Carolina and the plaintiffs have made no effort to attach the corporation's property in New Hampshire at this time. It remains quite desirable then, to effect the disposition, for acceptable consideration, of the New Hampshire realty before the plaintiffs attempt to reach it. You will need, nevertheless, to pay any legal fees owed to Tru-Tech, Inc.'s counsel in the Thomas case in order to keep them involved in the appeal process.

J.A. 625 ¶ c. The letter goes on to suggest, as a means of "protect[ing] the [Tru-Tech] real estate against any claims in the Thomas case and to preserve some possibility of recovery of some portion of the amounts owed to you and your corporation, . . . an arrangement," J.A. 625-26, under which a new corporation would be formed in New

Hampshire for the purpose of assuming ownership of the Tru-Tech real estate. Finegold advised that "the arrangement suggested allows you and Peacock, Williams & Company to recover $130,000 if the new corporation eventually succeeds in consummating the sale of the premises," J.A. 626, subject to the proviso that "the possibility exists of treatment of the transfer as a voidable preference," J.A. 626.

Peacock and Finegold then held a meeting to discuss further the subject of the Tru-Tech judgment, "as a consequence of which," J.A. 628, Finegold, in a March 13, 1989 letter, identified for Peacock "the various matters on which we had settled as a strategy," J.A. 628, including, in particular, the following:

> (3) The [Tru-Tech] corporation will refrain, for the time being, from payment of any obligations arising out of the Thomas litigation, pending further developments on this front.
>
> . . . .
>
> (7) The [Tru-Tech] corporation will, with the use of its receivables, pay down the amounts owed to Peacock, Williams & Company, and to you, personally, in order to start running the one year period for avoidance of preferences to control persons in bankruptcy.

J.A. 628.

The "strategy" outlined in Finegold's letters to Peacock was never fully implemented. Still, several questionable transactions were executed during this general time frame. We summarize them here.

On April 30, 1988, a $31,804 Tru-Tech receivable from Marion LP was "netted on Tru-Tech's books" so as to become a receivable of PW & C. J.A. 433.

By authorization dated October 31, 1988, Peacock, as sole director of Tru-Tech, transferred a $27,235.08 Tru-

Tech receivable known as the "Uhlman note" to Finegold and Peacock's wife as trustees of the D. Grant Peacock trust, the beneficiary of which is Peacock's wife. In return for this transfer, Finegold claimed, by letter dated April 3, 1989, to have forwarded to Peacock checks payable to Tru-Tech for $27,235.08. The letter requests that Peacock furnish Finegold with "a schedule showing the application by Tru-Tech of the $27,235.08 paid, an application which, I assume, involves some favored creditors like Peacock, Williams & Company, Incorporated." J.A. 618.

Judge Traxler concluded "that there was either no consideration paid for the assignment of the Uhlman note on October 31, 1988, or the assignment was simply backdated to reflect that as the supposed date of transfer," 1992 U.S.Dist. LEXIS 18749, at *12, and, further, "that the purpose of the sale of the Uhlman Note was to get enough cash into Tru-Tech to pay the $25,000 retainer to Greenville [counsel] for the purpose of handling the appeal of the *Thomas* judgment," *id.;* October 31, 1988, the purported date of the sale, predates the entry of judgment in favor of plaintiffs in the original trial.

At a March 6, 1989, Tru-Tech board meeting attended by Peacock, Finegold and Blackburn, Peacock agreed to pay $130,000 of Tru-Tech funds to PW & C. Peacock asserts that this was to repay PW & C for money paid to Blackburn to manage Tru-Tech's affairs, even though, prior to that date, the evidence showed that PW & C had "written off" that amount due.

On a June 26, 1989, Tru-Tech pro forma balance sheet, Peacock made a handwritten note that a $47,000 Tru-Tech receivable known as the "Brodsky note" should be transferred to PW & C. Further, next to numerous balance sheet liability entries, including the entry "Judgment —Jack Thomas Case" as well as entries for interest thereon and estimated attorneys' fees, is the handwritten word, "Forget." J.A. 542.

By unanimous consent order dated July 1, 1989, the Tru-Tech board of directors, of which Peacock was by then the sole member, approved the transfer of the Brodsky note to PW & C "for accounts payable owed by Tru-Tech to Peacock Williams." J.A. 590. Blackburn, as Tru-Tech's president, formally executed the transfer on October 20, 1989, "for consideration paid," J.A. 588.

On November 1, 1989, Tru-Tech assigned a $5,737.75 receivable from Marion LP to PW & C.

On February 15, 1990, Peacock resigned as a director of Tru-Tech. Yet, as late as May of that year, Peacock continued to sign checks, drawn on Tru-Tech's bank accounts, for legal fees.

On April 26, 1990, Blackburn tendered his letter of resignation as Tru-Tech's president. Nevertheless, for some six months thereafter, Blackburn remained on PW & C's payroll and continued to oversee the "wrapping up" of Tru-Tech's affairs.

On May 1, 1990, Williams resigned as Tru-Tech's executive vice president, treasurer and secretary. Yet, on May 4, 1990, he authorized the assignment of a $5,000 mortgage from Tru-Tech to PW & C.

When, in 1990, the plaintiff class, by way of Pennsylvania counsel, served interrogatories on PW & C, Finegold, and Peacock and his wife, Finegold responded, by letter dated August 30, 1990:

> [A]s I understand the situation, Tru-Tech, Inc., . . . has discontinued its businesses, and disposed of all its fixed assets . . .; and all of its directors and officers with any detailed knowledge of the businesses and affairs of the corporation have resigned. As a practical matter, then, the corporation is defunct; and there is no one known to Grant Peacock or to me who has the authority and knowledge to prepare the answer demanded to the interrogatories propounded.

J.A. 632.

Based on the foregoing, the district court found that Peacock failed to observe the traditional corporate format and engaged in a "corporate strategy" with "the specific intent and purpose . . . [of] siphon[ing] off [Tru-Tech's] assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment." 1992 U.S.Dist. LEXIS 18749, at *19. Peacock appeals.

III.

Peacock argues that this suit is one merely to collect an outstanding judgment and that, because ERISA is not thereby implicated, the district court lacked subject matter jurisdiction over this case.[6] He also argues that, even if the district court properly exercised jurisdiction, it erred in applying a federal common law, as opposed to state law, standard for piercing the corporate veil. Proper evaluation of these contentions requires that we examine the nature of an attempt to pierce the corporate veil.

As we explained in *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681 (4th Cir.1976):

> [I]t is recognized that a corporation is an entity, separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders. This is expressed in the presumption that the corporation and its stockholders are separate and distinct. . . . But this concept of separate entity is merely a legal theory . . . and the courts "decline to recognize [it] whenever recognition of the corporate form would extend the principle of incorporation 'beyond its legitimate purposes and [would] produce injustices or inequitable consequences.' "

Id. at 683 (citation and footnote omitted) (quoting *Krivo Indus. Supply Co. v. National Distillers and Chem.*

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[6] It is undisputed that there is no diversity of citizenship in this action, and that there is no basis for federal question jurisdiction other than the fact that the suit seeks to enforce a judgment obtained pursuant to ERISA.

Corp., 483 F.2d 1098, 1106 (5th Cir.1973), *modified*, 490 F.2d 916 (1974)).

"An attempt to pierce the corporate veil is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action . . . ." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41, at 603 (perm. ed. rev. vol. 1990).[7] However, although an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action, it is not simply an attempt to collect a preexisting liability against an entity already found liable under the relevant substantive law; it is, rather, an attempt to impose such a preexisting liability upon an entity *not otherwise liable*. *See Sandlin v. Corporate Interiors Inc.*, 972 F.2d 1212, 1217 (10th Cir.1992) (in a "cause of action based upon the alter ego theory[,] . . . in theory the court is merely trying to identify the true debtor on the judgment"). Thus, the doctrine of piercing the corporate veil is not a mere procedural rule relating to "how" a judgment is to be enforced, but is, rather, a substantive rule of liability. *See Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 149 (3d Cir.1988) (holding that, in diversity case, federal district court properly applied New Jersey substantive law of veil-piercing). Last, we note that "the doctrine of piercing the corporate veil is an equitable one." 1 Fletcher, *supra*, § 41, at 603.

IV.

Peacock argues that, once the plaintiff class won its judgment against Tru-Tech, it became a judgment creditor, like any other. The district court, he argues, therefore lacked subject matter jurisdiction over Thomas' attempt to pierce the corporate veil. We reject this argument.

It is black letter law that

[7] We note that, at page 27 of his brief, Peacock, albeit in another context, relies upon this very excerpt from Professor Fletcher's treatise.

> the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. . . . Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.

Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 187, 18 L.Ed. 768 (1867). We established above that an attempt to pierce the corporate veil is a matter of substantive law that determines whether a corporate shareholder can be held liable for a preexisting judgment entered against the corporation. An attempt to pierce the corporate veil, therefore, seeks to identify those parties against whom the judgment can be satisfied. Because identification of those parties who are liable is necessarily antecedent to procedural enforcement of the judgment against those parties, and because *Riggs* establishes that federal courts have "ancillary" jurisdiction over enforcement of judgments, it would seem that the federal courts' "ancillary" jurisdiction would extend to the instant attempt to pierce the corporate veil.

Before we leave the issue, however, we must assure ourselves that our conclusion is in accord with the Supreme Court's holding in *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 30 S.Ct. 601, 54 L.Ed. 855 (1910).[8] There, a

[8] The Seventh Circuit in *Argento v. Village of Melrose Park*, 838 F.2d 1483, 1488 (7th Cir. 1988), discounted the Justice Holmes' opinion in *Beecher* as a "case, decided over 75 years ago, [that] is three paragraphs long containing a conclusion, but virtually no discussion." Further, noted that Court, "[i]t has rarely been cited as precedent." *Id.* We are skeptical of the Seventh Circuit's notion that, as an inferior court, we may evade Supreme Court precedent on grounds of "desuetude." *Cf. United States v. Chase*, 18 F.3d 1166, 1169 (4th Cir.1994) ("Although there has been little discussion of [*Ball v. United States*, 140 U.S. 118, 11 S.Ct. 761, 35 L.Ed. 377 (1891),] since it was decided in 1891, the Supreme Court and the Eighth Circuit, in deciding other issues, have recognized its continued vitality."). Nor are we convinced, as was

Connecticut corporate patentholder brought a patent infringement suit in federal court against another Connecticut corporation. During the pendency of the suit, the directors of the defendant corporation voted to continue sales in alleged violation of the plaintiff's patent. Plaintiff proved the victor in the patent infringement case but was unable to collect from the defendant corporation, which was by then insolvent.

Plaintiff then filed a second suit in federal court against the directors of the insolvent corporation. In its complaint, plaintiff alleged that the defendants voted to continue sales "kn[o]w[ing] that [insolvency] would be the result of a judgment against [their corporation in the first suit], but did the acts alleged for the purpose of increasing the value of their stock in the company, and of receiving the profits and dividends that might be received from the sale." *Id.* at 498, 30 S.Ct. at 601-02.

On plaintiff's appeal of the second suit, Justice Holmes, writing for the Court, rejected Plaintiff's characterization of the suit as one to hold the directors jointly and severally liable with their corporation for their part in infringing plaintiff's patent, *id.*, instead according plaintiff's complaint its "natural interpretation [as] an attempt to make the defendants answerable for the judgment already obtained," *id.* The Court then summarily concluded that the case "of course [did] not" fall within the federal court's ancillary jurisdiction. *Id.* at 499, 30 S.Ct. at 602.

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the Third Circuit in *Skevofilax v. Quigley*, 810 F.2d 378, 385 n. 5 (3d Cir.) (en banc), *cert. denied*, 481 U.S. 1029, 107 S.Ct. 1956, 95 L.Ed.2d 528 (1987), that "Justice Holmes probably intended the [*Beecher*] opinion to be an interpretation of the . . . governing statute," and that the possibility that Justice Holmes might have "intended his opinion to serve as a pronouncement on the constitutional limits of ancillary jurisdiction" should be dismissed because "he certainly kept that intention to himself, for it is nowhere mentioned in the opinion." In any event, we may assume *Beecher*'s continuing vitality, for the case is distinguishable on its facts from the case now before us.

The Court concluded: "[I]f the directors are under obligations by Connecticut to pay a judgment against their corporation, that is not a matter that can be litigated between citizens of the same State in the Circuit Court of the United States." *Id.*

Beecher is factually distinguishable from the case at bar. While the instant case involves allegations that Peacock deliberately engaged in improper transfers and improperly ignored corporate formalities with the specific purpose of evading the already-extent judgment against Tru-Tech, *Beecher* involved an allegation that corporate directors, acting within their legal capacity, voted to continue sales of a product which was the subject of a then-pending patent infringement suit. *Beecher*, however, does make clear that the mere fact that a "former judgment [provides] the foundation of [a subsequent] case," *id.*, is insufficient, alone, to establish that the subsequent case falls within the federal court's ancillary jurisdiction. In particular, where the subsequent action is truly "independent" of the former action and judgment, there is no ancillary jurisdiction. *See Sandlin v. Corporate Interiors Inc.*, 972 F.2d 1212, 1217 (10th Cir.1992) ("We read *Beecher* as saying that when postjudgment proceedings seek to hold nonparties liable for a judgment on a theory that requires proof on facts and theories significantly different from those underlying the judgment, an independent basis for federal jurisdiction must exist."); *Berry v. McLemore*, 795 F.2d 452, 455 (5th Cir.1986) ("garnishment actions against third parties are construed as independent actions from the primary action which established the judgment debt" and, therefore, the "court's ancillary jurisdiction to enforce its judgment does not extend to these garnishment actions").[9]

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[9] We do not, by our citation of the Fifth Circuit's decision in *Berry*, mean to imply a holding that garnishment actions against third parties are, in fact, "independent actions from the primary action which established the judgment debt"; that issue, of course, is not now before us.

Without defining the precise contours of when a subsequent litigation is "independent" of a former litigation and judgment, we believe that Thomas' attempt to pierce the corporate veil is not "independent" of the initial litigation herein. As noted above, an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action. That Thomas opted to file a separate action to pierce Tru-Tech's corporate veil is irrelevant: the court's subject matter jurisdiction does not turn on whether Thomas pursued the procedurally proper route. Further, we do not believe that the possibility that Thomas may not have been able to pursue this litigation at the same time as the initial litigation should affect the fact that this is, at bottom, a proceeding the goal of which is to collect the judgment earlier obtained by the plaintiff class. *Cf. Sandlin v. Corporate Interiors Inc., supra*, 972 F.2d 1212;[10] *but cf. Blackburn Truck Lines, Inc. v.*

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[10] In *Sandlin*, a successful age discrimination plaintiff sought to collect judgment against the owners of the debtor corporation, who were not parties to the initial age discrimination litigation, on an alter ego theory. The Tenth Circuit read *Beecher*, which it described as "[a] typically cryptic Justice Holmes opinion," 972 F.2d at 1217, to say "that when postjudgment proceedings seek to hold nonparties liable for a judgment on a theory that requires proof on facts and theories sigificantly different from those underlying the judgment, an independent basis for federal jurisdiction must exist," *id.* Purporting to apply that standard to the case before it, the court, "[w]ithout attempting to decide all future cases, when the alter ego contentions may be more intertwined with the merits of the underlying claim within the court's primary jurisdiction, we hold the district court properly dismissed the instant alter ego claims." *Id.* at 1218. The court reached this conclusion on the grounds that the attempt to invoke the alter ego doctrine involved "significantly different factual proof, new parties, [and] prejudgment actions." *Id.* By contrast, the court indicated that "[p]ursuing the new parties . . . on a successor theory" would be viable to the extent that plaintiff could allege "postjudgment transfers of [the corporate debtor's] property." *Id.* (citing *Chris-*

Francis, 723 F.2d 730 (9th Cir.1984)[11]. There is, in short, simply no practical reason to treat this litigation

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tiansen v. Mechanical Contractors Bid Depository, 404 F.2d 324 (10th Cir.1968)).

The Tenth Circuit's holding in *Sandlin* is not inconsistent with, and, indeed, can be read to support, our conclusion herein. First, the case at bar involves primarily conduct by Peacock occurring after the judgment in the initial litigation was obtained. Moreover, to whatever extent the Tenth Circuit may properly have observed that, for jurisdiction to lie, "alter ego contentions [should] be [somewhat] intertwined with the merits of the underlying claim," we note that the district court here found that Peacock engaged in a strategy with "the specific intent and purpose . . . [of] siphon[ing] off [Tru-Tech's] assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment." 1992 U.S.Dist. LEXIS 18749, at *19.

[11] In *Francis*, the plaintiff, who was unable to collect upon default judgments it previously had obtained against two bankrupt corporations, brought suit against the three owners of both corporations, seeking to pierce the corporate veil. The court of appeals held that jurisdiction was proper in the district court. Reasoned the court: "In one sense this suit is an effort to enforce the initial default judgment; in another sense it is an effort to accomplish what a joinder might have provided." *Id.* at 732.

We do not believe that the Ninth Circuit's reference to joinder has bearing here. This is because Peacock was in fact a party to the initial litigation, although not in the same capacity as he was in the phase of litigation now under review. Moreover, plaintiffs presumably could not successfully have pursued their veil-piercing claim because most of the actions which led the district court to its conclusion had then yet to occur. Nevertheless, we do not think that these differences warrant a different conclusion as to jurisdiction. Especially where, as here, a stock-holder has deliberately manipulated corporate assets in order to frustrate the ability of one who holds a judgment against the corporation by virtue of federal law, we think it clear that the federal courts have jurisdiction to ensure that the federal judgment is ultimately collected. To the extent that the Ninth Circuit's opinion in *Francis* suggests otherwise, we respectfully disagree.

We would note that the *Francis* court made no mention of the Justice Holmes' opinion in *Beecher*.

as separate from the initial litigation.[12] *Cf. Pineville Real Estate Operation Corp. v. Michael,* 32 F.3d 88 (4th Cir. 1994) (holding that there is no federal question jurisdiction over case where the plaintiff brought action against defendants who had, in an earlier ERISA case, obtained judgments against the plaintiff, seeking to enjoin state enforcement of the judgment liens obtained by defendants and where the only federal statute or rule relied upon in plaintiffs complaint was Fed.R.Civ.P. 54(b)).

Peacock places heavy reliance upon the Supreme Court's statement in *Mackey v. Lanier Collection Agency & Service,* 486 U.S. 825, 833, 108 S.Ct. 2182, 2187, 100 L.Ed.2d 836 (1988), that "ERISA does not provide an enforcement mechanism for collecting judgment won" in either actions brought against plans by purported beneficiaries or in actions brought by general creditors of the plan, *see* ERISA § 502, 29 U.S.C. § 1132. Peacock reads this statement out of context. The *Mackey* Court immediately proceeded to note that, while ERISA did not provide for an enforcement mechanism, where suit is filed in federal court, judgment enforcement is conducted pursuant to Federal Rule of Civil Procedure 69(a), which adopts state law for judgment enforcement mechanisms. 486 U.S. at 833-34, 108 S.Ct. at 2187-88. Thus, the mere fact that ERISA may not provide an explicit mechanism for judgment enforcement does not mean that ERISA does not provide *jurisdiction* for judgment enforcement. Therefore, even assuming, *arguendo,* that piercing the corporate veil is merely a method of judgment enforcement,[13] *Mackey* does not undermine but, rather, supports the district court's exercise of jurisdiction.

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[12] For this reason, we reject Peacock's challenge to the venue of the instant litigation, as well as his contention that the district court erred in failing to certify the plaintiff class for purposes of the instant litigation.

[13] We, in fact, consider and reject this argument below.

Peacock also claims that the Supreme Court's decision in *Mertens v. Hewitt Associates,* —— U.S. ——, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), establishes that the instant litigation against him was improperly maintained. We disagree. In *Mertens,* the Court hold that ERISA provides for no action for monetary damages against nonfiduciaries. The current attempt by plaintiffs is not, however, as discussed above, an independent action for monetary damages against a nonfiduciary, but an equitable attempt to satisfy a previous judgment entered against a fiduciary.

We therefor conclude that jurisdiction was proper in the district court.

V.

Having determined that the court below properly exercised jurisdiction over Thomas' claim, we now turn to whether the district court applied the proper legal standard in adjudicating Thomas' attempt to pierce Tru-Tech's corporate veil.[14] The district court relied upon a federal

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[14] Peacock argues that the doctrine of piercing the corporate veil has no place in ERISA actions at all. He argues that, wherever the corporate veil should be pierced so that a shareholder will be subject to the ERISA fiduciary liability of its corporation, ERISA, standing alone, should allow the shareholder to be sued as a fiduciary; piercing the corporate veil, he argues, adds nothing to ERISA, but "results [only] in an uncomfortable inconsistency: the imposition of liability on an individual who previously had been adjudged not to be a fiduciary and hence not to have any liability under ERISA's statutory scheme." Appellant's Br. 23.

We disagree. The tests for ERISA fiduciary liability and veil-piercing are not identical, especially where, as here, most of the activity leading to the conclusion of veil-piercing occurs *after* the activity pursuant to which the corporation is deemed to have breached its ERISA fiduciary duties.

Peacock also argues that *res judicata* should bar Thomas' claim here. Thomas, Peacock argues, could and should have brought his piercing claim at the same time as his ERISA claim. The record does not provide the support necessary to this argument, however:

common law rule for piercing the corporate veil in ERISA cases. Peacock argues that the Supreme Court's decision in *Mackey* forecloses the existence of a federal common law veil-piercing rule in ERISA actions. We disagree. The *Mackey* Court held that "ERISA does not provide an enforcement mechanism for collecting judgments won in" suits brought by plan beneficiaries, pursuant to ERISA § 502(a)(1)(B), (d), 29 U.S.C. § 1132(a)(1)(B), (d), against ERISA benefit plans. Even assuming, *arguendo,* that ERISA also does not provide an enforcement mechanism for collecting judgments won in suits brought by plan beneficiaries, pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), such as the initial litigation won by plaintiffs,[15] *Mackey* would only preclude a federal common law veil-piercing rule in ERISA actions to the extent that an attempt to pierce the corporate veil is merely an enforcement mechanism for collecting a judgment. It would be error, however, as we discuss above in Section III, to characterize the doctrine of piercing the corporate veil as a mere judgment enforcement mechanism. Because a rule of veil-piercing determines *who* is liable for breaches of ERISA fiduciary duties, we believe that ERISA preempts any state law of veil-piercing. *See* ERISA § 514(a), 29 U.S.C. § 1144(a); 1 Fletcher, *supra,* § 41.90, at 91 (Supp.1993) ("In disputes involving workers' claims to ERISA benefits, a federal court may apply a federal common law standard of corporate separateness.").

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most of the transactions relied upon by Judge Traxler in piercing the corporate veil did not occur until *after* completion of the initial ERISA litigation.

[15] ERISA § 502(a)(2) allows for "[a] civil action [to] be brought . . . by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(2). ERISA § 409, 29 U.S.C. § 1109, in turn, imposes liability upon plan fiduciaries who breach their fiduciary duties. Plaintiffs, in the initial litigation, were successful in establishing, pursuant to ERISA § 409, 29 U.S.C. § 1109, that Tru-Tech was a fiduciary of the benefit plan it had established, and that Tru-Tech had breached its fiduciary duties.

Having concluded that the determination of whether to pierce the corporate veil in an ERISA action is made under federal law, we turn to what standard the federal veil-piercing rule adopts. *See Phoenix Mut. Life Ins. Co. v. Adams,* 30 F.3d 554, 563-64 (4th Cir.1994). The First Circuit in *Alman v. Danin,* 801 F.2d 1, 3-4 (1st Cir.1986), explained:

> There is no litmus test in the federal courts governing when to disregard corporate form. The Supreme Court has, however, provided some guidance, stating that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.,* 306 U.S. 307, 322, 59 S.Ct. 543, 550, 83 L.Ed. 669 (1939). The Court has further indicated that corporate form may not defeat overriding federal legislative policies. *See First National City Bank v. Banco Para el Comercio Exterior de Cuba,* 462 U.S. 611, 630, 103 S.Ct. 2591, 2602, 77 L.Ed.2d 46 (1983); *Bangor Punta Operations, Inc. v. Bangor & Aroostook Railroad Co.,* 417 U.S. 703, 713, 94 S.Ct. 2578, 2584, 41 L.Ed.2d 418 (1974). This court has said,
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> > The general rule adopted in the federal cases is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity," [citing *Capital Telephone Co. v. FCC,* 498 F.2d 734, 738 (D.C.Cir.1974)]. In applying this rule, federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form [citations omitted], an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine. . . .
>
> *Town of Brookline v. Gorsuch,* 667 F.2d 215, 221 (1st Cir.1981).

ERISA, the statute sought to be enforced here, cannot be said to attach great weight to corporate form. Indeed, deferring too readily to the corporate identity may run contrary to the explicit purposes of the Act. Congress enacted ERISA in part because many employees were being deprived of anticipated benefits, which not only reduced the financial resources of individual employees and their dependents but also undermined the stability of industrial relations generally. *See* 29 U.S.C. § 1001 (1982) (statement of congressional findings and declaration of policy); H.Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad. News 4639, 4670, 4676. Allowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct Congress would want to prevent.

801 F.2d at 3-4. Several other circuits have followed similar reasoning. *Ellison v. Shenango Inc. Pension Bd. v. Snyder*, 956 F.2d 1268, 1274-75 (3d Cir.1992); *Janowski v. International Bhd. of Teamsters Local No. 710 Pension Fund*, 673 F.2d 931, 941 (7th Cir.1982), *vacated on other grounds*, 463 U.S. 1222, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983); *see NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir.1993) (interpreting federal rule to allow veil piercing only where "(i) . . . there [was] such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct and (ii) . . . adherence to the corporate fiction [would] sanction a fraud, promote injustice, or lead to an evasion of legal obligations"). We, too, find this reasoning persuasive [16]

[16] We note that this federal common law veil-piercing rule accords with our understanding of the South Carolina rule, as expounded

and, accordingly, adopt the liberal veil-piercing standard enunciated by the First Circuit in *Alman* for use in ERISA actions. As a consequence, we conclude that the district court applied the correct legal standard in evaluating the plaintiff class' effort to pierce Tru-Tech's corporate veil.

in our opinion in *DeWitt Truck Brokers, Inc. v. W. Kay Flemming Fruit Co.*, 540 F.2d 681 (4th Cir.1976). There, we explained that the "concept of [the corporation as a] separate entity is merely a legal theory . . . and the courts 'decline to recognize [it] whenever recognition of the corporate form would extend the principle of incorporation beyond its legitimate purposes and [would] produce injustices or inequitable consequences.'" *Id.* at 683 (footnote omitted) (quoting *Krivo Indus. Supply Co. v. National Distillers and Chem. Corp.*, 483 F.2d 1098, 1106 (5th Cir.1973), *modified*, 490 F.2d 916 (1974)). We proceeded to stress that "proof of plain fraud is not a necessary element in a finding to disregard the corporate entity," *id.* at 684, and that "courts have experienced 'little difficulty' and have shown no hesitancy in applying what is described as the 'alter ego' or 'instrumentality' theory in order to cast aside the corporate shield and to fasten liability on the individual stockholder," *id.* at 685 (quoting *Iron City Sand & Gravel Div. of McDonough Co. v. West Fork Towing Corp.*, 298 F.Supp. 1091, 1098 (N.D.W.Va.1969), *rev'd on other grounds*, 440 F.2d 958 (4th Cir. 1971)). Thus, while the federal veil-piercing test may "usually give[] less respect to the corporate form than does the strict common law alter ego doctrine," *Town of Brookline*, 667 F.2d at 221, the South Carolina doctrine of veil-piercing accords with the ERISA veil-piercing standard announced in *Alman*. *Compare Perpetual Real Estate Servs., Inc. v. Michaelson Properties, Inc.*, 974 F.2d 545, 549 (4th Cir.1992) (noting that the standard we set out in *DeWitt* is "not the law in Virginia," which sets more stringent standards for piercing the corporate veil).

In light of the foregoing, we observe that, to the extent that, "[w]hile the veil piercing inquiry in an ERISA case is . . . rooted in federal law, state is not rendered completely irrelevant," *United Elec., Radio and Machine Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1092 n. 12 (1st Cir.1992), and that, in "apply[ing] federal substantive law, . . . we may look to state law for guidance," *Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc.*, 736 F.2d 516, 523 (9th Cir.1984), the federal standard we apply accords with South Carolina veil-piercing law.

VI.

Peacock next argues that, on the facts presented, the district court erred in concluding that Tru-Tech's corporate veil should be pierced. We disagree. The district court found, as matters of fact, that Peacock owned a controlling (and, at most relevant times, a complete) interest in Tru-Tech and, from March of 1988 until its liquidation, served as Tru-Tech's sole director; that PW & C hired Blackburn to wind down Tru-Tech's business and, in turn, billed Tru-Tech $10,000 a month for financial services, and also for incidental expenses; and that numerous transfers were effected among Tru-Tech, PW & C, Peacock and others without proper consideration or formalities. On the basis of these facts and others set out above, the court further found that Peacock engaged in a "corporate strategy" with "the specific intent and purpose . . . [of] siphon[ing] off [Tru-Tech's] assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment." 1992 U.S. Dist. LEXIS 18749, at *19. On the record before us, we cannot characterize these findings of fact as clearly erroneous.

We also review the district court's decision to pierce Tru-Tech's corporate veil under the clearly erroneous standard. *DeWitt Truck Brokers, Inc., supra,* 540 F.2d at 684; *accord Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc.,* 736 F.2d 516, 523 (9th Cir.1984) (reviewing, under the clearly erroneous standard, the district court's decision in an ERISA case to pierce the corporate veil). Under that limited standard of review, the district court's decision will not be disturbed.

Peacock's remaining arguments against the district court's judgment regarding the imposition against him of the Tru-Tech ERISA liability established in the initial litigation are without merit. We consequently affirm the district court's judgment in that regard.

VII.

Following the determination by the district court in the initial litigation that Tru-Tech was liable while Peacock was not, District Judge G. Ross Anderson, Jr., entered an order allowing plaintiffs to defer any motion for attorneys' fees until final disposition of the initial litigation. Because of the appeal of the initial litigation and the subsequent attempt to pierce Tru-Tech's corporate veil, such a motion was not made until the instant litigation was complete in the district court. At that time, District Judge William B. Traxler, Jr., referred the matter back to Judge Anderson for determination of fees arising out of the initial litigation. Judge Anderson applied the five-factor test enunciated in *Reinking v. Philadelphia American Life Insurance Co.,* 910 F.2d 1210, 1217-18 (4th Cir.1990), to determine whether a fee award was appropriate, and, finding that one was, the twelve-factor test adopted in *Barber v. Kimbrell's, Inc.,* 577 F.2d 216, 226 & n. 28 (4th Cir.), *cert. denied,* 439 U.S. 934, 99 S.Ct. 329, 58 L.Ed.2d 330 (1978), to fix the amount thereof. Ultimately, Judge Anderson decided that a fee of $123,181.25 was reasonable, along with costs of $13,103.60. Judge Traxler undertook a similar inquiry and analysis with respect to fees arising out of the veil-piercing litigation, concluding that $64,406.25 in attorneys' fees and $4,490.91 in costs were due. Thus, a total of $205,182.01 in attorneys' fees and expenses were assessed against Peacock. This, we note as a preliminary matter, exceeds the total damages assessed in this case. Peacock argues both that it was inappropriate for the district court to award attorneys' fees in this case and that, even if such an award was appropriate, the amount of the award was excessive. We reject Peacock's first argument but find his second argument persuasive.

In keeping with ERISA § 502(g)(1)'s explicit grant of discretion to the district courts to award "a reasonable attorney's fee," 29 U.S.C. § 1132(g), we review the dis-

trict court's decision to award attorneys' fees solely for abuse of discretion, *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1028 (4th Cir.1993) (en banc). Peacock argues that, because the initial litigation resulted in his exoneration, any award of attorneys' fees is unjust here. The truly culpable party, Peacock suggests, is Tru-Tech. Because this argument ignores the district court's finding that Peacock was Tru-Tech's alter ego and was, himself, culpable for siphoning off Tru-Tech's funds, we reject it and find no abuse of discretion in the district court's decisions to award attorneys' fees arising out of both stages of litigation in this case.

Of far greater weight is Peacock's challenge to the *amount* of the fee awards announced by the district judges. Factor eight of the procedure established in *Barber v. Kimbrell's, Inc.*, for fixing the amount of an attorneys' fee award is "the amount in controversy and the results obtained." 577 F.2d at 226 n. 28. This is "the most critical factor," in such an analysis. *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). Yet, although the fee award for the initial litigation amounts to more than two-thirds of the total award resulting from that litigation, the district court, in its discussion of "the most critical factor" in the *Barber* analysis focused on the result and the tenacity of the attorneys without mentioning the size of the proposed attorneys' fee and costs award in comparison with the total damage award.[17] A subsequent discussion in the district court's opinion justifies the disproportionate award by citation to cases discussing fee awards in the context of civil rights actions, and by asserting that the policies underlying ERISA are equally strong. This justification is without basis in law. We think it safe to say, without belittling the important interests which ERISA serves to

[17] Nor did the district court discuss the size of the fee award in the context of another *Barber* factor, the attorneys' reasonable expectations at the outset of the litigation.

protect, that the federal civil rights laws provide more vital protections and vindicate far more important interests. *Cf. Quesinberry*, 987 F.2d at 1030 (noting Congress' decision not to implement, in the ERISA context, "a mandatory fee shifting rule analogous to 42 U.S.C. § 1988"). As the Fifth Circuit has explained:

> The policies underlying ERISA are certainly important ones, but they simply do not rise to the level of assuring that all citizens are accorded their civil rights. Not only are the policies that [ERISA] is designed to enforce less compelling than those furthered by [the civil rights laws], but the need for attorneys' fees as an enforcement incentive is less under ERISA than the . . . civil rights statutes. Plaintiffs suing under the [civil rights laws] are "private attorneys general" in the sense that they seek injunctive relief to vindicate important public rights. If such "plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." [*Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)]. Plaintiffs under Title I of ERISA may be seeking injunctive relief for the benefit of all the participants and beneficiaries of a particular plan. but they may also be seeking damages on behalf of their plan or simply the recovery of benefits from the plan that are due them alone. Fiduciaries, moreover, may have a statutory obligation to bring ERISA suits. Thus, incentives in the form of attorneys' fees are, on the whole, less necessary to insure that the statute is enforced.

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1265-66 (5th Cir.1980) (footnotes omitted); *accord Ellison v. Shenango Inc. Pension Bd. v. Snyder*, 956 F.2d 1268, 1274-75 (3d Cir.1992); *Janowski v. International Bhd. of Teamsters Local No. 710 Pension Fund*, 673 F.2d

931, 941 (7th Cir.1982), *vacated on other grounds,* 463 U.S. 1222, 103 S.Ct. 3565, 77 L.Ed.2d 1406 (1983). We agree with the position taken by other circuits in this regard. We therefore vacate the attorneys' fees determination entered by the district court with regard to the initial litigation.[18] On remand, the district court should recalculate, in a manner consistent with this opinion, the amount of attorneys' fees.

With respect to the district court's assessment of attorney' fees with regard to the instant attempt to pierce Tru-Tech's corporate veil, Peacock claims that the district court erred in failing to address whether any portion of the total hours spent by the plaintiff's attorneys was devoted solely to plaintiffs' case against Finegold, which, as opposed to plaintiffs' case against Peacock, was not successful. We disagree. It is true that "no fees should be awarded for time spent on unsuccessful claims that were unrelated to successful ones." *Abshire v. Walls,* 830 F.2d 1277, 1282 (4th Cir.1987). Where, however, the facts of an unsuccessful claim are "inextricably intertwined" with those of a successful claim, fees for total time spent are appropriately awarded because both claims required investigation of a "common core of facts." Here, given Finegold's relationship to Peacock and his role in Peacock's and Tru-Tech's transactions, and the nature of the claims raised against Finegold, we conclude that the facts underlying all of the plaintiffs' claims in this litigation were "inextricably intertwined."

Peacock also raises several specific objections to the district court's assessment of attorneys' fees as to both phases of the litigation herein. First, Peacock cites numerous examples where the court, in assessing attorneys' fees with respect to both phases of litigation, awarded fees to cover the presence of both of plaintiffs' primary lawyers even though, Peacock claims, the presence of only one would have sufficed. *See Goodwin v. Metts,* 973 F.2d 378, 383-85 (4th Cir.1992). Second, Peacock claims that the district court awarded items of "cost" which do not fall within the definition of the term at 28 U.S.C. § 1920. Last, Peacock describes as excessive the time plaintiffs' counsel claim to have spent in preparing their fee petitions for submission to the district court and in performing unspecified tasks since the victory against Peacock in the veil-piercing phase of this case.

[18] We also note that the district court, in assessing attorneys' fees with respect to the initial litigation, made reference to plaintiffs' counsel's success in piercing Tru-Tech's corporate veil in the instant litigation. This was error. In proceeding under the "results obtained" factor in determining an appropriate fee award for the initial litigation, the district court should confine its consideration to the "results obtained" in that litigation.

The district judges' orders herein reveal no examination of the objections described above. While we acknowledge the great deference we afford district courts in assessing the proper amount of attorneys' fees and costs, *Goodwin,* 973 F.2d at 385, where a party raises specific objections to particular fees or items of cost, we believe it appropriate for the district court, in the first instance, to address such objections and make appropriate factual finding in order that we might arrive at an informed review of the district court's decision. *See Joseph A. by Wolfe v. New Mexico Dep't of Human Servs.,* 28 F.3d 1056, 1060-61 (10th Cir.1994).

VIII.

We affirm the district court's judgment allowing the plaintiff class to pierce Tru-Tech's corporate veil and recover the damages assessed in the initial litigation from Peacock. While we affirm the district court's decision to allow the plaintiff class to recover the attorneys' fees it incurred in maintaining both the initial litigation and the instant litigation, we vacate the amounts of attorneys' fees and costs assessed by the district court and remand for recalculation consistent with this opinion.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

APPENDIX B

[Filed and Entered Oct. 28, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

C/A No. 7:91-3843-21

JACK L. THOMAS, Individually and on Behalf of the Tru-Tech, Inc. Pension Plan, and as a Representative of a Class of Plaintiffs Similarly Situated,

Plaintiff,

vs.

D. GRANT PEACOCK and ALAN H. FINEGOLD,

Defendants.

ORDER

This matter is before the court as a nonjury trial. I find for the Plaintiff against D. Grant Peacock. I do not find for the Plaintiff against Alan H. Finegold.

Background of the Case

In 1987 the Plaintiff ("Thomas") brought an action in United States District Court in South Carolina on behalf of himself and other employees of Tru-Tech, Inc. ("Tru-Tech") seeking payment of pension benefits under the Tru-Tech, Inc. Pension Plan ("the Pension Plan"). *Thomas v. Tru-Tech, Inc.*, No. 7:87-2243-3 (D.S.C. 1988). In that action, Thomas asserted numerous causes of action, including breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* (1982). The substance of

Thomas' claim was that he and others were entitled to pension benefits under an amendment to the Pension Plan.

In November 1988, the district court ruled that Thomas was entitled to benefits and further held that Tru-Tech, as a fiduciary of the Pension Plan, was liable to Thomas under ERISA for breach of its fiduciary duty in the amount of $187,628.93. The case was appealed to the Fourth Circuit Court of Appeals which, in April 1990 affirmed in all respects the lower court's decision and left intact Thomas' judgment against Tru-Tech. *See Thomas v. Tru-Tech, Inc.*, 900 F.2d 256 (4th Cir. 1990) (table only; text available on Westlaw).

Following the decision by the Fourth Circuit, Thomas attempted to some extent to collect the judgment from Tru-Tech, but was unsuccessful. Thomas then brought the present suit against D. Grant Peacock ("Peacock"), individually, and Peacock's attorney, Alan H. Finegold ("Finegold"), on theories of civil conspiracy, fraudulent transfer of assets, and corporate veil piercing under ERISA and applicable federal law. Thomas alleged Peacock and Finegold conspired to improperly channel Tru-Tech's assets in order to defeat Thomas' claim as a judgment creditor. In addition, Thomas alleged that Peacock's control over Tru-Tech's affairs was such that Tru-Tech was a mere "alter ego" of Peacock himself and that Tru-Tech's disregard for corporate formalities justified piercing the corporate veil in order to secure satisfaction of the $187,628.93 *Thomas* judgment.

Findings of Fact

Tru-Tech was organized in 1981 as a Delaware corporation to purchase a textile machinery parts manufacturing business from the Draper division of Rockwell International. Financing for the two plants, located in Marion, South Carolina, and Beebe River, New Hampshire, was arranged through a group of investors from Pittsburgh, Pennsylvania. Grant Peacock was one of these

investors. A partnership named Marion Limited Partners was established for the purpose of purchasing the Marion, South Carolina, plant from Rockwell International and leasing it to Tru-Tech. An office was placed in Spartanburg, South Carolina.

The promoters and founders of Tru-Tech expected the business to derive substantial revenue primarily from two sources. First, they expected to continue supplying parts to Rockwell's Draper Division which manufactured looms. Second, they believed that Tru-Tech had purchased the tooling for Draper parts and that they could sell these parts on the open market. Unfortunately, their expectations did not come to fruition and the business failed.

Despite the general sluggishness in the textile industry at the time, the demise of Tru-Tech can be attributed to two events that occurred simultaneously. First, within six months of Tru-Tech's purchase of Rockwell's Draper parts manufacturing business, Rockwell sold its Draper Division to another group of investors who immediately reduced inventories, thus severely reducing orders Tru-Tech expected to fill. Second, the "new" Draper filed suit against Tru-Tech alleging that Draper, not Tru-Tech, had the tooling rights for Draper parts. It was determined subsequently that Draper had in fact retained these rights, and it was at this point that Tru-Tech's potential for profit was eliminated.

By September of 1983, Tru-Tech had lost a substantial sum of money and Bill W. Wilcock, Tru-Tech's president and chief executive officer, was terminated and replaced by John H. Blackburn, Tru-Tech's Vice President of Operations. The Spartanburg office was closed. Since Tru-Tech continued to lose money, it became Blackburn's responsibility to liquidate Tru-Tech's assets.

During the latter half of 1985 and early 1986, Tru-Tech managed to sell all of its productive assets in South Carolina. Although the lease between Marion Limited

Partners and Tru-Tech did not expire until the fall of 1986, Tru-Tech quit paying rent in February of 1986. Operations at the Beebe River Plant in New Hampshire ceased in June of 1986. While Tru-Tech maintained assets at this plant, management sought to liquidate the assets to reduce its financial liabilities. Tru-Tech's negative net worth increased from $893,676.00 on September 30, 1986, to $1,376,888.00 on September 30, 1990, thus evidencing the fact that Tru-Tech continued to lose money. Among the liabilites owed by Tru-Tech were the amount of Thomas' judgment, approximately $50,000.00 owed to Grant Peacock & Co., approximately $350,000.00 owed to Peacock individually, and several other large outstanding debts.

D. Grant Peacock was the sole stockholder and director of Peacock, Williams & Company, formerly D. Grant Peacock & Company. He also ended up serving as the sole director of Tru-Tech from March of 1988 until its liquidation. Peacock owned controlling interest in Tru-Tech prior to the sale of 724,980 shares to Timothy H. Williams and John H. Blackburn for $200.[1] Peacock was a CPA and a lawyer who also served as a partner in Marion Limited Partnership.

Following discontinuation of the operations of Tru-Tech, Peacock testified that John H. Blackburn was "placed on the payroll of Peacock, Williams" for the purpose of handling the wrap-up of Tru-Tech in July 1986. For this service and for the service of operating out of Peacock's office in Pittsburgh, Peacock, Williams & Company billed Tru-Tech $10,000 per month for "financial consulting services," generating a large receivable on the books of Tru-Tech in excess of $110,000. However, according to an August 3, 1989, memo to Timothy H. Williams, with a copy to Peacock and Jack Blackburn, "The

[1] Although the stock certificates are dated December 10, 1988, they were forwarded by Grant Peacock to John Blackburn for his signature as president of Tru-Tech on April 4, 1990.

Peacock, Williams books contain[ed] no receivable from Tru-Tech because the management fee receivable of approximately $110,000 was written off in the year ended January 31, 1987." During the entire period from November 1, 1986, through October 31, 1988, Peacock, Williams & Company billed Tru-Tech for such incidental expenses as telephone bills, travel, entertainment, legal fees, UPS, Federal Express, office supplies, Xerox, postage, and petty cash. Peacock testified that during this period no accounting records were kept for Tru-Tech "since it had no employees."

On November 28, 1988, the Plaintiff obtained the judgment from the district court against Tru-Tech. An appeal was taken immediately thereafter. After obvious discussions with Peacock concerning the *Thomas* judgment, Finegold wrote Peacock on March 2, 1989, stating in part as follows:

> I see no reason for any payment with regard to the Thomas litigation unless and until the judgment becomes final and constitutes a lien on real estate held for sale. As I understand the situation, the corporation owns no real estate in South Carolina and the plaintiffs have made no effort to attach the corporation's property in New Hampshire at this time. It remains quite desirable then, to effect the disposition, for acceptable consideration, of the New Hampshire realty before the plaintiffs attempt to reach it. You will need, nevertheless, to pay any legal fees owed to Tru-Tech, Inc.'s counsel in the Thomas case in order to keep them involved in the appeal process.

In the same letter, it was suggested to Peacock "in order to protect the real estate against any claims in the Thomas case and to preserve some possibility of recovery of some portion of the amounts owed to you and your corporation" that Peacock consider an elaborate scheme under which a new corporation would be formed in New Hampshire for the purpose of receiving a transfer of the

Tru-Tech real estate. Recognizing that "the possibility exists of treatment of the transfer as a voidable preference," Finegold nonetheless advised that "the arrangement suggested allows you and Peacock, Williams & Company to recover $130,000 if the new corporation eventually succeeds in consummating the sale of the premises."

Following more discussions with Peacock, on March 13, 1989, Finegold wrote to Peacock "as a consequence of our meeting this past Monday with respect to Tru-Tech, Inc.," to point out "the various matters on which we had settled as a strategy," including:

> (3) The corporation will refrain, for the time being, from payment of any obligations arising out of the Thomas litigation, pending further developments on this front.
>
> . . . .
>
> (7) The corporation will, with the use of its receivables, pay down the amounts owed to Peacock, Williams & Company and to you, personally, in order to start running the one year period for avoidance of preferences to control persons in bankruptcy.

Following this exchange of correspondence, on a Tru-Tech Proforma Balance Sheet dated June 26, 1989, Peacock indicated in his own handwriting that the note receivable shown on the books of Tru-Tech as the "Brodsky Note" with a value of $47,000 should be transferred to Peacock, Williams & Company and that Tru-Tech should "forget" the $187,628.93 *Thomas* judgment carried as a liability on the Tru-Tech balance sheet together with estimated interest on the judgment of $12,000 and estimated Plaintiff's attorneys' fees of $50,000. It is also worthy of note that this same document shows that the asserted consideration for this preferential transfer of the Brodsky Note to Peacock, Williams & Company was the same management fee for "financial consulting services" which were written off on the books of Peacock, Williams & Company in the year ending January 31, 1987.

According to this "strategy," Peacock, who by then was sole director of Tru-Tech, executed a written consent of the Tru-Tech Board of Directors dated July 1, 1989, authorizing the Brodsky Note to be transferred to Peacock, Williams & Company "for accounts payable owed by Tru-Tech to Peacock, Williams," and the assignment of the Brodsky Note was executed by John H. Blackburn as president of Tru-Tech on October 20, 1989. Blackburn was then operating out of Peacock's office in Pittsburgh. However, although the transfer date of the Brodsky Note is shown in Tru-Tech's general ledger with a transaction date of July 31, 1989, a typed list of accounts payable for Tru-Tech dated April 19, 1990, still shows a total of $111,706 payable to Grant Peacock & Company with a handwritten entry questioning whether the $40,000 Brodsky Note should be deducted.

In addition to the Brodsky Note, deposition exhibits identified by Peacock and Finegold indicate that a note receivable known as the "Uhlman Note" was transferred to Finegold and Nancy B. Peacock. The authorization for this transfer, signed by D. Grant Peacock as sole director of Tru-Tech, is dated October 31, 1988, and Finegold testified in his deposition that a check should have been issued to Tru-Tech "more or less" at the same time:

> Q. And the check would have been at the same time as far as you know?
>
> A. I assume more or less. Whether it was on the exact same day that the note was signed, I don't know.

The date of the transfer and payment of consideration is important because, if the authorization was actually executed on the date shown in Plaintiff's Deposition Exhibit # 7, this transfer would have taken place on October 31, 1988, twenty-eight days prior to the entry of the *Thomas* judgment against Tru-Tech. Finegold testified that "Mr. Peacock contacted me and indicated to me that

Tru-Tech, Inc., had as one its assets this particular note" and that Tru-Tech "was badly in need of funds that it could use to pay certain obligations and that it wished to sell this note for cash." However, the actual "transaction date" shown on the general ledger of Tru-Tech for the transfer of the Uhlman Note is May 31, 1989. In addition, Thomas introduced as Exhibit # 31 a letter from Finegold dated April 3, 1989, the first paragraph of which states:

> Pursuant to your request, I have signed and enclosed herewith, in my capacity as trustee of the D. Grant Peacock Trust for Nancy B. Peacock u/a dated December 26, 1985, two checks payable to the order of Tru-Tech in the aggregate amount of $27,235.08 constituting the purchase price of the Uhlman note, including interest accrued through same date.

This same letter requests that Peacock furnish Finegold "a copy of the so-called Uhlman note" and "a schedule showing the application by Tru-Tech of the $27,235.08 paid, an application which, I assume, involves some favored creditors like Peacock, Williams & Company, Incorporated."

Thus, the evidence is that there was either no consideration paid for the assignment of the Uhlman Note on October 31, 1988, or the assignment was simply backdated to reflect that as the supposed date of transfer. In addition, the court finds that the purpose of the sale of the Uhlman Note was to get enough cash into Tru-Tech to pay the $25,000 retainer to Greenville attorney David L. Freeman for the purpose of handling the appeal of the *Thomas* judgment.[2] Deposition exhibits identified by Peacock indicate that reports on the progress of the *Thomas* litigation were made by Freeman to John H. Blackburn as senior vice-president of Peacock, Williams &

[2] According to a pencil entry on the Tru-Tech accounts payable list of July 31, 1989, the $25,000 retainer appears to have been paid on June 2, 1989.

Company and that Freeman's bill for handling the appeal was sent, not to Tru-Tech, but to Peacock himself and to Grant Peacock & Company.[3]

In addition to these transfers, Tru-Tech also transferred a receivable from Marion Limited Partners, in which Peacock was a partner, in the amount of $5,737.75 to Peacock, Williams & Company on November 1, 1989, together with a $5,000 note on May 4, 1990.[4] There is further evidence that Peacock was the "alter ego" of Tru-Tech in a memorandum dated November 2, 1989, which stated:

> On September 30, 1987, Tru-Tech, Inc., shows a payable to Peacock Williams of $31,804. Tru-Tech also shows a receivable from Marion Limited Partners for $37,541.75.
>
> On April 30, 1988, the two amounts were netted on Tru-Tech's books lowering the receivable from Marion Limited Partners to $5,737.75 and the amount due tc Peacock, Williams to zero.
>
> Marion Limited Partners and Peacock, Williams should now reflect this change. Marion Limited Partners now owes Peacock, Williams $31,804.[5]

Peacock continued to act as the "alter ego" of Tru-Tech even after his purported resignation as a director

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[3] Freeman's letter of January 6, 1989, enclosing his $25,000 "retainer statement" was sent directly to D. Grant Peacock of D. Grant Peacock and Company, and the invoice itself is directed to Grant Peacock & Company, Inc.

[4] This transfer was pursuant to what Peacock called "a floating authorization," and the assignment was executed by Timothy H. Williams as executive vice-president of Tru-Tech on May 4, 1990, four days after he resigned as an officer of Tru-Tech on May 1, 1990.

[5] This remaining Tru-Tech receivable of $5,737.75 was subsequently transferred to Peacock Williams & Company on November 1, 1989.

on February 15, 1990. On March 6, 1990, Finegold forwarded him "for signature in connection with the withdrawal of Tru-Tech, Inc., from the State of New Hampshire," a letter to the State of New Hampshire "apparently required for completion of this process." Finegold continued to bill Peacock for delinquent legal services accounts of Tru-Tech through May of 1990, and Peacock continued to sign checks for legal fees on the bank account of Tru-Tech, including a $249.91 check dated May 29, 1990, and a check for $1,057.16 dated May 31, 1990. However, although Finegold had no problem in getting Peacock to sign Tru-Tech checks in payment of Finegold's legal fees after Peacock had resigned as a director, on August 30, 1990, Finegold wrote to Donald L. Phillips, a Pittsburgh attorney hired by Thomas to undertake supplemental proceedings in Pennsylvania, stating in part as follows:

> Apparently, a problem exists in furnishing answers to those interrogatories; for at present, as I understand the situation, Tru-Tech, Inc. . . . has discontinued its businesses, and disposed of all of its fixed assets . . . ; and all of its directors and officers with any detailed knowledge of the businesses and affairs of the corporation have resigned. As a practical matter, then, the corporation is defunct; and there is no one known to Grant Peacock or to me who has the authority and knowledge to prepare the answers demanded to the interrogatories propounded.

Further, with respect to Peacock's credibility, there was no reference to Marion Limited Partners' transfer to Peacock, Williams & Company in Peacock's answers to garnishee interrogatories in the Pennsylvania supplemental proceedings[6] and the evidence reveals the back-dating of the stock certificates from Peacock to Timothy H. Williams

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[6] The interrogatories were signed by Finegold and verified by Peacock.

and John R. Blackburn from April 4, 1990 to December 10, 1988.[7]

Based on the background findings stated above, the court makes the following specific findings of fact:

1. Grant Peacock was the sole shareholder and director of Peacock, Williams & Company, formerly Grant Peacock & Company.

2. From March 1988 until its ultimate dissolution in May of 1990, Peacock was the controlling shareholder and sole director of Tru-Tech. He directed and controlled essentially all of its affairs, including its finances, dictated the disposition of its assets, and ran the company from his own office in Pittsburgh, either directly or through other employees of Peacock, Williams & Company.

3. During the entire period from November 1986 through its ultimate dissolution in May of 1990, there was a failure to observe corporate formalities between Tru-Tech, Grant Peacock, and Peacock, Williams & Company. No dividends were paid, there were no independently functioning officers and directors other than Peacock and those employees of Peacock, Williams & Company dominated by Grant Peacock; there was an absence of many of the corporate records normally found in a functioning corporation, and the corporate shell of Tru-Tech was merely a facade for the operation of the dominant will of Grant Peacock.

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[7] In his deposition, Peacock testified that the reason for this stock transfer had nothing to do with tax considerations. However, Tru-Tech's amended 1988 tax return dated January 5, 1990 states as follows: "This return as originally filed incorrectly indicated that a shareholder owned more than 50% of the stock as of year end. This return is filed to correct the answer to question 1(a) and (b) on the original return." Peacock testified that the stock was issued in September of 1989, but the actual documents show that the stock certificates were not signed until April 1990.

4. During the entire period prior to and after the entry of the *Thomas* judgment against Tru-Tech in November 1988 through its ultimate dissolution in May of 1990, Tru-Tech was and remained insolvent. In contemplation of the *Thomas* judgment and following its entry, Peacock directed the management of Tru-Tech's affairs to defeat the collection of the *Thomas* judgment by siphoning off the assets of the corporation to certain favored creditors owned or controlled by Peacock, including Peacock, Williams & Company and the D. Grant Peacock Trust for Nancy B. Peacock.

5. Included in the assets of Tru-Tech siphoned off by Peacock to certain favored creditors owned or controlled by him were the following:

(a) The Uhlman Note valued at $27,235.

(b) The Brodsky Note valued at $47,000 to $48,000.

(c) The Marion Limited Partners' receivable valued at $5,737.75.

(d) A note transferred to Peacock, Williams & Company in May 1990 valued at $5,000.

6. The stated consideration for the bulk of these transfers was a $110,000 receivable payable to Peacock, Williams & Company primarily for "financial consulting services" billed to Tru-Tech during the time it was dominated and controlled by Peacock and Peacock, Williams & Company. This receivable had been previously written off on the books of Peacock, Williams & Company in January of 1987. The remaining consideration for these transfers was a cash payment from the D. Grant Peacock Trust for Nancy B. Peacock, the apparent purpose of which was to pay the retainer charged by Greenville attorney David Freeman to Peacock and Grant Peacock & Company for handling the appeal of the *Thomas* judgment.

7. These assets of Tru-Tech were siphoned off by Peacock pursuant to a corporate strategy developed by him. It was the specific intent and purpose of this strategy to siphon off these assets to favored creditors owned or controlled by Peacock and to defeat collection of the *Thomas* judgment.

8. There was a significant intermingling of funds as well as overlap of administrative personnel between Tru-Tech and Peacock, Williams & Company. As a result of these and other actions of Peacock as the dominant shareholder and director, Tru-Tech failed to observe traditional corporate formalities.

9. In his efforts to siphon off the assets of Tru-Tech to favored creditors owned or controlled by Peacock, it was the specific intent of Peacock to defraud the former employees of Tru-Tech who were beneficiaries of the Pension Plan and to defeat their legitimate attempt to collect a lawful judgment.

10. The corporate form of Tru-Tech during the period of November 1986 through its ultimate dissolution in May of 1990, and even following that date, was a mere facade, and during that period Tru-Tech was nothing more than the "alter ego" of Peacock and an instrumentality dominated and controlled by him.

11. Under the facts of this case and in light of the clear legislative purpose of ERISA, it would be inequitable and unfair to allow Tru-Tech's corporate form to be misused for the purpose of depriving its employees of their anticipated benefits and of avoiding lawful financial obligations to an employee benefit plan under ERISA.

12. The involvement of Finegold was not proven to have exceeded the scope of proper legal representation.

Conclusions of Law

A. *Federal Policy Under ERISA*

The applicable federal policy under ERISA was well stated by the United States Court of Appeals for the First Circuit in *Alman v. Danin*, 801 F.2d 1, 304 (1st Cir. 1986) where the court explained:

> There is no litmus test in the federal courts governing when to disregard corporate form. The Supreme Court has, however, provided some guidance, stating that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322, 59 S.Ct. 543, 550, 83 L.Ed. 669 (1939). The Court has further indicated that corporate form may not defeat overriding federal legislative policies. . . . This Court has said,
>
> > The general rule adopted in the federal cases is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity. . . ." In applying this rule, federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form . . . , an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine. . . .
>
> . . . .
>
> ERISA, the statute sought to be enforced here, cannot be said to attach great weight to corporate form. Indeed, deferring too readily to the corporate identity may run contrary to the explicit purposes of the Act. Congress enacted ERISA in part because many employees were being deprived of anticipated benefits, which not only reduced the financial resources of individual employees and their dependents but also undermined the stability of industrial relations gen-

> erally. . . . Allowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct Congress wanted to prevent.

801 F.2d at 3-4 (citations omitted).

In deciding whether it is appropriate to disregard the corporate form and to impose liability upon the dominant shareholder under the "alter ego" doctrine, the courts have generally focused on the following three factors:

> the small respect paid by the shareholders themselves to [the corporation's] separate corporate entity; the fraudulent intent of the incorporator; and the degree of injustice that would be visited on the litigants by recognizing the corporate identity. Other courts have looked to similar factors where ERISA is involved. . . .[8]

Citing *Alman v. Danin,* with approval, the Seventh Circuit in *Lumpkin v. Envirodyne Industries, Inc.,* 933 F.2d 449, 461 (7th Cir. 1991) stated as follows:

> The underlying congressional policy behind ERISA clearly favors the disregard of the corporate entity in cases where employees are denied their pension benefits. In *Pension Ben. Guaranty Corp. v. Quimet Corp.*, 711 F.2d 1085 (1983), certiorari denied, 464 U.S. 961, 104 S.Ct. 393, 78 L.Ed.2d 337, the First Circuit pierced the corporate veil to impose liability upon the solvent members of a corporation that had declared bankruptcy. The court emphasized that the congressional intent of ERISA is to hold employers

[8] *Alman v. Danin,* 801 F.2d at 4, citing *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch,* 757 F.2d 184, 190 (8th Cir. 1985); *Laborers Clean-up Contract Administration Trust Fund v. Uriarte Clean-up Service, Inc.,* 736 F.2d 516, 524 (9th Cir. 1984).

> responsible for pension benefits, so that when the corporate form poses a bar to liability, "concerns for corporate separateness are secondary to what we view as the mandate of ERISA." . . . Thus under *Quimet Corp.*, the corporate form chosen by defendant does not necessarily preclude plaintiffs from piercing the corporate veil and suing Envirodyne. If justice would be served and potential fraud nullified then plaintiffs should be able to proceed against the party that had actual control of WSC and EDC.[9]

In *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Company,* 540 F.2d 681 (4th Cir. 1976), the Fourth Circuit described the appropriate considerations in determining whether the corporate veil should be pierced. In an opinion by Judge Donald Russell, the court stated:

> At the outset, it is recognized that a corporation is an entity, separate and distinct from its officers and stockholders, and that its debts are not the individual indebtedness of its stockholders. . . . But this concept of separate entity is merely a legal theory, "introduced for purposes of convenience and to subserve the ends of justice," and the courts "decline to recognize [it] whenever recognition of the corporate form would extend the principle of incorporation 'beyond its legitimate purposes and [would] produce injustices or inequitable consequences.'" . . . . Accordingly, "in an appropriate case and in furtherance of the ends of justice," the corporate veil will be pierced and the corporation and its stockholders "will be treated as identical."

DeWitt Truck Brokers, 540 F.2d at 683.

The Fourth Circuit stressed the "proof of plain fraud is not a necessary element in a finding to disregard the

[9] *Lumpkin v. Envirodyne Industries, Inc.,* 933 F.2d 449, 461 (7th Cir. 1991).

corporate entity" (540 F.2d 684) and "that the mere fact that all or almost all of the corporate stock is owned by one individual or a few individuals, will not afford sufficient grounds for disregarding corporateness. . . ."

> But when substantial ownership of all the stock of a corporation in a single individual is combined with other factors clearly supporting disregard of the corporate fiction on grounds of fundamental equity and fairness, courts have experienced "little difficulty" and have shown no hesitancy in applying what is described as the "alter ego" or "instrumentality" theory in order to cast aside the corporate shield and to fasten liability on the individual stockholder. . . .

DeWitt Truck Brokers, 540 F.2d at 685.

Stating that the piercing of the corporate veil is a question of fact that is "particularly in the province of the trial court" (540 F.2d 684), the Fourth Circuit in *DeWitt Truck Brokers* stated:

> One fact which all the authorities consider significant in the inquiry, and particularly so in the case of the one-man or closely held corporation, is whether the corporation was grossly under-capitalized for the purposes of the corporate undertaking. . . . And [t]he obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter . . . during the corporation's operations. . . . Other factors that are emphasized in the application of the doctrine are failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning the funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. . . .

DeWitt Truck Brokers, 540 F.2d at 685-687 (citations omitted).

In accord with these rules, see *Federal Deposit Insurance Corporation v. Sea Pines Company,* 692 F.2d 973 (4th Cir. 1982); *Sturkie v. Sifly,* 280 S.C. 453, 313 S.E.2d 316 (S.C. Ct. App. 1984); *C.T. Lowndes & Coe v. Suburban Gas & Appliance Company,* 415 S.E.2d 404 (S.C. Ct. App. 1991); *Cumberland Wood Products, Inc. v. Bennett,* 1992 W.L. 71171 (S.C. Ct. App. 1992); *Central States v. Minneapolis Van and Warehouse Company,* 746 F. Supp. 1289, 1294-1296 (N.D. Ill. 1991). The general rule is also stated in *Fletcher Cyclopedia of Corporations,* section 41.90, page 715, as follows:

> The federal rule states that a corporate entity may be disregarded in the interest of public convenience, fairness, and equity, and in applying this rule the federal courts will look closely at the purpose of the federal statute involved to determine whether it places importance on corporate form. Under federal common law, the corporate form may be disregarded in the interest of justice where it is used to defeat an overriding public policy. . . .

In *Leddy v. Standard Drywall, Inc.,* 875 F.2d 383, 387-88 (2nd Cir. 1989), the court held that the president and major shareholder of a corporation who conspired with the corporation to defraud pension, welfare, and fringe benefits of their employees was individually liable under ERISA for unpaid contributions even though traditional conditions for piercing the corporate veil were not met. On the issue of individual liability of Gedell, as president and major shareholder of the corporation, the court stated:

> We agree with Gedell that the District Court did not make sufficient findings for a conclusion to pierce the corporate veil under traditional common law principles, nor was there sufficient proof at trial that would support such a conclusion. But this does not absolve Gedell of liability.

Section 515 of ERISA imposes an obligation to make contributions to employee benefit funds on "every employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement." 29 U.S.C. § 1145. The term "employer" is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002.

. . . .

Gedell was not merely a major shareholder and controlling officer of a company that neglected to make required benefit plan contributions. He and other Standard officials engaged in a criminal conspiracy to defraud the Funds. . . .

. . . .

The Supreme Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies. . . .

. . . .

Shielding from liability a controlling corporate officer who, like Gedell, deliberately flouts ERISA obligations by conspiring to defraud employee pension and welfare plans would surely defeat this legislative purpose. We therefore hold that at least to the extent that a controlling corporate official defrauds or conspires to defraud a benefit fund of required contributions, the official is individually liable under Section 502 of ERISA, 29 U.S.C. § 1132, just as he would be liable for unpaid minimum wages under [the Fair Labor Standards Act], even if the traditional conditions for piercing the corporate veil are not met. . . .

Leddy v. Standard Drywall, 875 F.2d at 387-88.

In *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970, 983 (11th Cir. 1986) the court stated that "because liability

here flows from ERISA, we find it appropriate to follow the Supreme Court's holdings, in cases arising under analogous labor law statutes, that have permitted imposing liability for contempt on a successor or alter ego."

> Accordingly, we affirm the district court's determination that Simmons and Alan's are liable to the Trustees for the unpaid pension funds. The factual support for the trial court's finding, in both respects, is overwhelming. Simmons directed and controlled the finances of both companies, as well as numerous others, and ran the whole lot out of one office. The decision not to pay the obligation under the consent decree was his. During the period when Ryan's was in default of its obligations under the consent decree, Simmons authorized over $60,000 in payments to himself and to other of his wholly owned concerns. . . . Further, there was significant intermingling of funds . . . as well as overlap of administrative personnel. . . . Upon all of this evidence we cannot properly say that the trial court's findings were clearly in error.

Combs v. Ryan's Coal Co., Inc., 785 F.2d at 983.

In *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987), the plaintiff-trustees of an ERISA pension plan sued the corporations, and their individual directors, responsible for investing the pension plan's funds. The plaintiffs alleged that the defendants engaged in prohibited transactions because the defendants owned or had an interest in some of the corporations in which the defendants were investing the pension plan's funds. *Id.* at 1212. In affirming summary judgment for the plaintiffs, the Second Circuit held that not only the corporations, but also the individual owners of the corporations, were liable for fiscal mismanagement:

> Neither the separate corporate status of the three corporations nor the general principle of limited share-

> holder liability afford protection where exacting obeisance to the corporate form is inconsistent with ERISA's remedial purposes. Parties may not use shell-game-like maneuvers to shift fiduciary obligations to one legal entity while channeling profits from self-dealing to a separate legal entity under their control.
>
> . . . .
>
> A failure to disregard the corporate form in the circumstances of the present case would fatally undermine ERISA. The record demonstrates beyond dispute extensive intermixing of assets among the corporations, and among the corporations and individual defendants.

Id. at 1220-21.

Lowen and *Alman* particularly demonstrate that federal courts will look to substance over form when allegations of corporate mismanagement or fraud are prosecuted under ERISA. Moreover, the federal courts will hold defendants personally liable for their fraudulent actions. The fact of the matter is that ERISA was enacted to prevent corporate machinations from hindering employee-plaintiffs in securing their benefits. ERISA clearly states this not only in its purpose clause, but also in its legislative history. The courts, therefore, have construed ERISA to have a broad, remedial scope.

B. *Civil Conspiracy*

The elements of a civil conspiracy under South Carolina law are (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiffs, and (3) which causes the plaintiffs special damages. *See LaMotte v. The Punchline of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711, 713 (1988); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E. 2d 150, 152 (S.C. Ct. App. 1987).

In *Lee v. Chesterfield General Hospital*, 289 S.C. 6, 344 S.E.2d 379 (S.C. Ct. App. 1986), the court explained the distinction between a civil conspiracy and criminal conspiracy as follows:

> A criminal conspiracy consists of "a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object or an object neither criminal nor unlawful by criminal or unlawful means." . . . ("A conspiracy consists . . . in the agreement of two or more to do an unlawful act, or to do a lawful act by unlaw means"). To establish a criminal conspiracy it is not necessary to prove an overt act. The gist of the crime is the unlawful combination. The crime is then complete, even though nothing further is done. . . .
>
> A civil conspiracy, on the other hand, consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. . . . The gravamen of the tort is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. . . . A civil conspiracy may, of course, be furthered by an unlawful act. . . . However, an unlawful act is not a necessary element of the tort. An action for conspiracy may lie even though no unlawful means are used and no independently unlawful acts are committed.

Lee v. Chesterfield General Hospital, 344 S.E.2d at 381-82 (citations omitted).

C. *Specific Conclusions*

1. The plaintiff has the burden of proof and must establish each and every element of his cause of action by the preponderance of the evidence. This means that the plaintiff must produce evidence which, when consid-

ered in the light of all the facts, leads this court to believe that what the plaintiff claims is more likely true than not.

2. While the doctrine of corporate entity is recognized generally and for most purposes, it will not be regarded when to do so would work fraud or injustice, nor may the corporate form be misused to defeat overriding federal legislative policies.

3. The general rule adopted is that a corporate entity may be disregarded in the interest of public convenience, fairness, and equity. Under the clear legislative purposes of ERISA, the courts do not attach great weight to corporate form when to do so would deprive employees of their anticipated benefits and avoid lawful financial obligations to employee benefit plans.

4. The primary considerations in determining whether to pierce the corporate veil under ERISA are the amount of respect paid by the shareholders themselves to the corporations' separate corporate entity, the fraudulent intent of the dominating shareholder, and the degree of injustice that would be visited on the litigants by recognizing the corporate entity. The underlying congressional policy behind ERISA clearly favors the disregard of the corporate entity in cases where employees are wrongfully denied their pension benefits. The congressional intent of ERISA is to hold employers responsible for pension benefits, so that when the corporate form poses a bar to liability, concerns for corporate separateness are secondary to the mandate of ERISA. If justice would be served and potential fraud nullified, then the beneficiaries of the plans should be able to proceed against the party that has actually exerted dominant control over the corporation.

5. Proof of plain fraud is not a necessary element in a finding to disregard the corporate entity, but when substantial ownership of the stock of a corporation in a single individual is combined with other facts clearly supporting disregard of the corporate fiction on the grounds of fundamental equity and fairness, there should be little difficulty and no hesitancy in applying the alter ego doctrine.

6. The evidence in this case dictates the conclusion that Peacock was the "alter ego" of Tru-Tech and that Tru-Tech was a mere "instrumentality" in his hands.

7. The Plaintiffs have sustained their burden of proof on the "alter ego" theory and are entitled to "pierce the corporate veil" and to recover a judgment against D. Grant Peacock for recovery of their previously rendered judgment for $187,628.93 against Tru-Tech together with interest and attorneys' fees.

8. The Plaintiffs have not sustained their burden of proving the essential elements of a civil conspiracy under South Carolina law, the elements being (a) a combination of two or more persons, (b) for the purpose of injuring the Plaintiffs, and (c) that such combination and conspiracy has caused the Plaintiffs special damages.

9. The Plaintiffs have not sustained their burden of proving liability on the part of Finegold.

THEREFORE, IT IS ORDERED that the Plaintiffs shall have judgment against D. Grant Peacock in the amount of $187,628.93 together with interest at the rate of 8.55% as set forth in the *Thomas* judgment and costs under 29 U.S.C. § 1132(q). Plaintiffs shall have thirty days after the filing of this Order to submit their petitions for attorneys' fees.

IT IS FURTHER ORDERED that the court finds for Alan H. Finegold and no judgment shall be entered against him.

IT IS SO ORDERED.

/s/ William B. Traxler, Jr.
WILLIAM B. TRAXLER, JR.
United States District Judge

Greenville, South Carolina
October 26, 1992.

APPENDIX C

[Filed and Entered Jun. 24, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

C/A NO: 7:91-3843-21

JACK THOMAS, Individually, on behalf of the Tru-Tech, Inc. Pension Plan, and as a Representative of a Class of Plaintiffs similarly situated,

Plaintiffs,

v.

D. GRANT PEACOCK and ALAN H. FINEGOLD,

Defendants.

ORDER

I. INTRODUCTION

The Defendants, D. Grant Peacock ("Peacock") and Alan H. Finegold ("Finegold") have moved the court to dismiss the action pursuant to Fed.R.Civ.P. 12(b)(2), asserting that this court lacks personal jurisdiction over them. Alternatively, Peacock and Finegold, pursuant to Fed.R.Civ.P. 12(b)(3), move to transfer venue of the case to the United States District Court for the Western District of Pennsylvania. Representative Plaintiff Thomas contends, however, that this court may exercise *in personam* jurisdiction over the Defendants because jurisdiction is statutorily conferred under 29 U.S.C. § 1132(e)(2) of "The Employee Retirement Income Security Act" ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1988). Moreover,

the Plaintiff claims that venue of this cause is proper in the District of South Carolina. Having considered the statutory scheme, the Congressional purpose of enacting ERISA, and the relevant caselaw, the court concludes that it may exercise personal jurisdiction over the Defendants and that venue is proper in this district. Accordingly, the court denies the Motion to Dismiss, Or In The Alternative, To Transfer This Action.

II. THE FACTS

The facts giving rise to the present motion originated with an ERISA action by Plaintiff Thomas, representing a similarly situated class of plaintiffs, on August 20, 1987, in the District of South Carolina before the Honorable Judge G. Ross Anderson, Jr. This action was filed by Thomas against Tru-Tech, Incorporated ("Tru-Tech"), Peacock, who was Chairman of the Board of Tru-Tech, Grant Peacock & Company, Incorporated, and Connecticut General Life Insurance Company, for breach of fiduciary duty in failing to fund properly the Tru-Tech Pension Plan. The court held that Thomas and his class were entitled to benefits and that Tru-Tech, a fiduciary of the pension plan, was liable to the Plaintiffs for breach of its fiduciary duties. Accordingly, Plaintiff Thomas and his class prevailed in this action and were awarded a judgment of $187,500.00 in November of 1988. *See Thomas v. Tru-Tech, Inc.*, No. 7:87-2243-3 (D.S.C. 1988). The Fourth Circuit affirmed the district court's judgment. *See Thomas v. Tru-Tech, Inc.*, 900 F.2d 256 (4th Cir. 1990) (unpublished opinion). This judgment remains unsatisfied, and its satisfaction is the impetus for the present action.

Further information is gleaned from the affidavits and memoranda of the parties and the unpublished appellate opinion affirming the earlier action. Tru-Tech was organized as a Delaware corporation in 1981 by Bill Wilcock for the purpose of acquiring a textile machinery parts

business. One of the businesses Tru-Tech acquired was a manufacturing plant in Marion, South Carolina. The other acquired plant was located in Beebe River, New Hampshire. In addition to acquiring a manufacturing plant in South Carolina, Tru-Tech also kept its corporate headquarters and sales offices in Spartanburg, South Carolina, thereby establishing itself in South Carolina and availing itself to South Carolina's jurisdiction. Significantly, the pension plan was administered in South Carolina, which also happens to be the district in which the Plaintiffs reside. Also in 1981, Tru-Tech formed a pension plan for the benefit of its employees. Although the plan stated its effective date was October 1, 1981, the plan was subject to approval by the Internal Revenue Service ("IRS"). The plan, however, was not submitted for approval until December 31, 1982. The IRS, on July 21, 1983, withheld its approval of the plan because its vesting schedule did not comply with the applicable law. The board of directors of Tru-Tech, therefore, on September 14, 1983, amended the plan to correct the defective vesting schedule.

By 1984, however, Tru-Tech was in financial straits. To this end, Tru-Tech's directors notified the IRS that their prior amendment of the vesting schedule was unauthorized and requested the IRS to issue an adverse determination as to the plan, which was issued on January 31, 1985 and became final on May 23, 1985. Accordingly, the plan was terminated; and its assets were refunded to Tru-Tech with interest.

The effective date of this plan was an issue in the earlier proceeding before Judge Anderson. Judge Anderson held that the plan became effective in 1981—the year the plan would have been approved had its vesting schedule been properly calculated by Tru-Tech's directors. The Fourth Circuit affirmed Judge Anderson's ruling, holding that the pension plan was indeed effective in 1981. *See* 900 F.2d 256 (4th Cir. 1990) (unpublished opinion).

By 1986, Tru-Tech had moved most of its operations to Pennsylvania and was no longer transacting business in South Carolina.

In the instant action, Plaintiff Thomas, for his class, is attempting to satisfy the judgment rendered by Judge Anderson in the previous case on the merits of the Plaintiffs' breach of fiduciary duty claim against Tru-Tech, Peacock, and others. In his present Complaint, Plaintiff Thomas alleges that Peacock, with the advice and counsel of Finegold, fraudulently transferred Tru-Tech's assets in an attempt to deprive the Plaintiffs of a *res* that would satisfy their judgment. Specifically, Plaintiff Thomas avers that Peacock and Finegold transferred Tru-Tech's assets to certain favored creditors, some of which are corporate entities allegedly controlled by Peacock. The alleged effect of these preferential transfers is that Tru-Tech is escaping not only the duties it had as a fiduciary of the pension plan, but also the judgment rendered adverse to it by Judge Anderson, whose ruling was affirmed by the United States Court of Appeals for the Fourth Circuit. Thus, the present action is an attempt to satisfy a former judgment properly rendered by the District Court.

III. DISCUSSION

A. *The Purpose of ERISA*

ERISA's broad, remedial scope is squarely established in the opening section of the Act:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, *and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.*

29 U.S.C. § 1001(b) (emphasis supplied). Apart from the expressly stated purpose of the Act, the legislative history reveals that ERISA contemplated a liberal interpretation, including liberal provisions for jurisdiction and venue. The House Committee on Education and Labor, reporting on drafts of the Act, stated:

> The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and *to remove jurisdictional and procedural obstacles* which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants. *For actions in federal courts, nationwide service of process is provided in order to remove a possible procedural obstacle to having all proper parties before the court.*

H.R.Rep. No. 93-533, 93rd Cong., 1st Sess., 17 (1973), *reprinted in* 1974 U.S.Code Cong. & Admin.News 4639, 4655 (emphasis supplied). ERISA, therefore, is to be construed liberally.

Like its purpose, ERISA's jurisdictional and venue provisions are sweeping in scope. Specifically, 29 U.S.C. § 1132(e)(2) provides:

> Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

Accordingly, the Act provides for nation-wide service of process. The jurisdictional implications of this national

service of process are the crux of the disputed issue in the present case.

In its Motion to Dismiss or Transfer Venue, the Defendants strenuously urge, pursuant to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny, that they have not established the proverbial "systematic and continuous minimum contacts" with South Carolina, nor have they availed themselves to the courts of the forum state. Therefore, the Defendants claim that this court's exercising *in personam* jurisdiction over them violates the Due Process Clause of the United States Constitution. *See* "Defendant's Motion To Dismiss Or In The Alternative, To Transfer This Action," pp. 9-19. While the Defendants correctly recite due process law and the limitations placed upon state courts, and federal courts sitting in diversity, to exercise jurisdiction over non-resident defendants, that argument is simply misplaced in the present action. Here, jurisdiction is premised upon a federal question, not upon diversity. Thus, the *United States*, not a state, is the sovereign. *International Shoe Co.*, therefore, does not apply; and the Defendants' assertions to the contrary fail in the wake of jurisdiction conferred by statute.

As stated, *International Shoe Co.* applies to the power of state courts and federal courts exercising diversity jurisdiction to extend their power and process beyond the borders of the state in order to compel the presence of non-residents. An *International Shoe Co.* analysis must first determine whether a state long-arm service of process statute exists and then whether ordering the defendant to appear by virtue of the long-arm statute comports with the Constitutional requirements of due process. The second prong of the *International Shoe Co.* analysis is determining whether the non-resident defendant has established "minimum contacts" with the forum state. *See Federal Ins. of America v. Lake Shore, Inc.*, 886 F.2d 654, 657 n.2 (4th Cir. 1989); *Wolf v. Richmond County*

Hosp. Auth., 745 F.2d 904, 909 (4th Cir. 1984). In the present action, 29 U.S.C. § 1132(e)(2), provides for national service of process. The statute conferring jurisdiction is a federal statute granting jurisdiction to courts of the United States. The Nation, therefore, is the entity seeking to establish its power and process. When the national law is at issue, Congress may freely prescribe for service of process and the federal courts—wherever situated—may just as freely exercise jurisdiction, even over parties residing outside the forum state:

> The jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries. Each of them, having by the law of its organization jurisdiction of the subject-matter of a suit, and of the parties thereto, can, sitting at Washington, exercise its power by appropriate process, served anywhere within the limits of the territory over which the Federal government exercises dominion.
>
> * * *
>
> It is true that Congress has declared that no person shall be sued in a circuit court [now, district court] of the United States who does not reside within the district for which the court was established, or who is not found there. But a citizen residing in Oregon may be sued in Maine, if found there, so that process can be served on him. There is, therefore, nothing in the Constitution which forbids Congress to enact that, as to a class of cases or a case of special character, a circuit court—any circuit court—in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision.

United States v. Union Pacific R.R., 98 U.S. 569, 603-04 (1878).

Moreover, the federal courts have specifically applied this reasoning and concluded that the *International Shoe Co.* analysis does not apply when federal courts are addressing federal law:

> Congress may provide for national service of process, *i.e., national exercise of personal jurisdiction by each of the district courts* based on presence of the defendant in the United States, rather than in any particular state. When Congress does not provide, the district court's service is not constrained by the due process limits to which state courts are subject.

Driver v. Helms, 74 F.R.D. 382, 390 (D.R.I. 1977) (citations omitted and emphasis supplied), *aff'd as to jurisdiction and modified on other grounds*, 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom., Colby v. Driver*, 444 U.S. 527 (1980) (*consolidated with Stafford v. Briggs*, 444 U.S. 527 (1980)). Specifically, the Fourth Circuit has held:

> [Defendant] argues before us that reliance on [Bankruptcy] Rule 704's provisions to determine whether the bankruptcy court had *in personam* jurisdiction over it would be misplaced, since valid service of process and personal jurisdiction are two separate concepts. In the abstract that may be true, but for purposes of proceedings arising from federal law, it is largely academic. . . . Where Congress has authorized nationwide service of process by federal courts under specific federal statutes, so long as the assertion of jurisdiction over the defendant is compatible with due process, the service of process is sufficient to establish the jurisdiction of the federal court over the person of the defendant.
>
> Since we have determined that Congress authorized nationwide service of process in cases like the present one, . . . [t]he propriety of process issuing

> from federal courts sitting in cases arising under federal law is not tested by [*International Shoe Co.*] because the issues involved necessarily are often national in character.

Hogue v. Mildon Eng'g, Inc., 736 F.2d 989, 991 (4th Cir. 1984) (citations omitted). Accordingly, the *Hogue* court held that a bankruptcy court in Virginia had personal jurisdiction over a non-resident California corporation because the bankruptcy law is federal law and provides for national process. Similarly, *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 824 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982), held that "In an action where service of process is effected pursuant to a federal statute which provides for nationwide service of process, the strictures of *International Shoe* do not apply." *See also Gilbert v. Bagley*, 492 F. Supp. 714, 747 (M.D.N.C. 1980).

The Defendants consistently urge upon the court that South Carolina has no jurisdiction over them and that they have established no minimum contacts in the forum state. This assertion reveals the flaw in the Defendants' reasoning, and consequently, its authority. The United States, not South Carolina, is the sovereign asserting jurisdiction over the Defendants by virtue of a federal statute. The Defendants are residents of the United States and they need merely have minimum contacts with the United States to effect jurisdiction over them, not minimum contacts with the forum state. The Second Circuit in *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974), aptly addressed this issue. In *Mariash*, the Defendants were served with process in Massachusetts, but venue was laid in New York. The defendants claimed that New York did not have jurisdiction over them because they had not established minimum contacts with New York. The statute at issue was the Securities Act of 1934, 15 U.S.C. § 78a *et seq.* (1988), of which § 78aa provided for national service of

process. Rejecting the defendants' contention that federal courts in New York could not exercise *in personam* jurisdiction, the Second Circuit held:

> It is not the State of New York but the United States 'which would exercise its jurisdiction over them.' And plainly, where, as here, the defendants reside within the territorial boundaries of the United States, the 'minimal contacts,' required to justify the federal government's exercise of power over them, are present. Indeed, the 'minimal contacts' principle does not, in our view, seem particularly relevant in evaluating the constitutionality of *in personam* jurisdiction based on nationwide, but *not* extraterritorial, service of process.

Mariash, 496 F.2d at 1143 (emphasis in original). Similarly, the Fifth Circuit upheld jurisdiction, conferred by federal statute, over a non-resident defendant which transacted no business in the forum state. The court, as here, rejected the defendant's assertion that due process had been violated:

> Subject *only* to the regulation of Congress, each federal court exercises the 'judicial Power of the United States,' not a judicial power constitutionally limited by the boundaries of a particular district. Because the district court's jurisdiction is always potentially, and, in this case, actually co-extensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States, 'the sovereign that created the court.'

FTC v. Jim Walter, Corp., 651 F.2d 251, 256 (5th Cir. 1981) (citations omitted and emphasis in original). Accordingly, provided that a defendant has minimum contacts with the United States, ERISA confers personal jurisdiction over the defendant in any federal district court. The irresistible conclusion, therefore, is that this court does exercise *in personam* jurisdiction over the Defend-

ants because the Defendants are residents of, and conduct business in, the United States.

Apart from the decisional law, this court's exercising personal jurisdiction over Peacock and Finegold comports with the Federal Rules of Civil Procedure. Specifically, Fed.R.Civ.P. 4(f) provides:

> All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, *when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.* (emphasis supplied).

Thus, Rule 4(f) recognizes the power of Congress to provide for nationwide service of process to enforce a federal right, as the Supreme Court in *Union Pacific R.R.* noted. This Congressional authority to provide for national process springs from the right of any sovereign to exercise jurisdiction over any defendant within its territory. *Gilbert v. Bagley,* 492 F. Supp. 714, 746 (M.D.N.C. 1980); *First Flight Co. v. National Carloading Corp.,* 209 F. Supp. 730, 736 (E.D. Tenn. 1962). Finally, the court notes that the weight of authority holds that there is no requirement of minimum contacts with the state in which the federal court sits when a federal statute provides for nationwide service of process. As the District of the District of Columbia held in *Combs v. Adkins & Adkins Coal Co.,* 597 F. Supp. 122 (D.D.C. 1984):

> Moreover, this Court possesses personal jurisdiction over the defendants, who reside in Kentucky. Where Congress has authorized nationwide service of process, a federal court may exercise personal jurisdiction over any United States resident, without regard to whether its sister state court could assert jurisdiction under minimum contacts principles.

Id. at 125. *See also Alman v. Danin,* 801 F.2d 1, 5 (1st Cir. 1986); *Securities Investor Protection Corp. v. Vig-*

man, 764 F.2d 1309, 1314-15 (9th Cir. 1985); *Haile v. Henderson Nat'l Bank,* 657 F.2d 816, 824-26 (6th Cir. 1981), *cert. denied,* 455 U.S. 949 (1982); *FTC v. Jim Walter Corp.,* 651 F.2d 251, 256 (5th Cir. 1981); *Fitzsimmons v. Barton,* 589 F.2d 330, 334 (7th Cir. 1979); *Mariash v. Morrill,* 496 F.2d 1138, 1142-43 (2d Cir. 1974); *United States Telecom, Inc. v. Hubert,* 678 F. Supp. 1500, 1508 (D. Kan. 1987); *City of Harrisburg v. Bradford Trust Co.,* 621 F. Supp. 463, 467 (M.D. Pa. 1985); *Piper Acceptance Corp. v. Slaughter,* 600 F. Supp. 169, 171 (D. Colo. 1985); *Clement v. Pehar,* 575 F. Supp. 436, 438-39 (N.D. Ga. 1983); and *Gilbert v. Bagley,* 492 F. Supp. 714, 746-47 (M.D.N.C. 1980). Accordingly, this court, by virtue of ERISA's statutory authority, may exercise personal jurisdiction over Peacock and Finegold.

Concluding that *International Shoe Co.* does not apply to the present action, the type of process the Defendants are due must now be considered. Here, ERISA provides for nationwide service of process. Since a federal statute is at issue, the fifth amendment, not the fourteenth amendment, of the Constitution is implicated. Fifth amendment due process, with respect to national service of process, only requires that a defendant receive sufficient notice of a legal proceeding, namely by first class or certified mail. This is the rule of *Mullane v. Central Hanover Bank & Trust,* 339 U.S. 306 (1950). The issue, therefore, is one of notice under the fifth amendment. The process due the defendant is whether the service was reasonably calculated to inform the defendant of the pendency of the proceedings against him so that he might have an opportunity to be heard and establish a defense. Certainly, Peacock and Finegold, residents of the United States, were given sufficient notice of the action pending against them: the Defendants received service of process and employed counsel to appear on their behalf. Because the Defendants are cognizant of the proceeding instituted against them, Peacock and Finegold received sufficient due proc-

ess; and their Constitutional due process rights have not been violated.

B. *Venue*

In their motion, the Defendants alternatively move the court to transfer this action to the Western District of Pennsylvania. Peacock and Finegold allege that Pennsylvania, not South Carolina, is the appropriate form for this action. The Defendants are residents of Pennsylvania and some of the allegedly fraudulent actions of the Defendants occurred in Pennsylvania. In support of this contention, the Defendants cite the general venue provisions of 28 U.S.C. § 1404(a) (1988), and claim that transfer of venue is routinely granted. As with their personal jurisdiction argument, the venue argument is equally misplaced because *ERISA itself* provides for venue; thus, 28 U.S.C. § 1404(a) does not apply to this action. ERISA specifically provides that a plaintiff may bring an action: (1) in the district where the plan is administered; (2) where the breach took place; or (3) where the defendant resides or may be found. 29 U.S.C. § 1132 (e)(2). ERISA plainly states that venue may lie where the plan was administered. Venue is proper in South Carolina, therefore, because the plan was administered in South Carolina.

The Plaintiffs, as residents of South Carolina, have properly chosen to prosecute their action in the District of South Carolina; and a plaintiff's choice of forum should not be disturbed unless the balance of equities strongly favors the defendant. *Gulf Oil v. Gilbert,* 330 U.S. 501, 508 (1947); *Gross v. Owen,* 221 F.2d 94, 95 (D.C.Cir. 1955). Moreover, when a claim may conceivably be held to have arisen in more than one district, "a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility . . . may be assigned as the locus of the claim." *Leroy v. Great Western United Corp.,* 443 U.S. 173, 185 (1979)

(citations omitted). When Congress has enacted a special venue provision for a particular action which the complaining party meets, the impetus on transferring the case decreases while the burden on the movant demonstrating that the action should be transferred increases. *International Bhd. of Painters v. Best Painting and Sandblasting Co.,* 621 F. Supp. 906, 907 (D.D.C. 1985). Also, a transfer will not be effected where the inconvenience to the defendant would simply be shifted to the plaintiff. *Trustees of Nat'l Asbestos Workers Pension Fund v. Lake Erie Ins.,* 688 F. Supp. 1059, 1060 (D.Md. 1988).

In *Combs v. Adkins & Adkins Coal Co.,* 597 F. Supp. 122 (D.D.C. 1984), the court, in denying the defendant's motion to transfer venue of an ERISA action, held:

> This Court also declines to disturb the plaintiffs' choice of forum by transferring this action to Kentucky under the doctrine of *forum non conveniens* or pursuant to its discretion under 28 U.S.C. § 1404(a). Numerous decisions of this Court have denied similar motions filed by non-resident defendants in other ERISA cases. The defendants were given ample notice that litigation could ensue in the District of Columbia, and in any event, *it makes good sense to hear this case where the Plans are administered.*

Id. at 125 (citations omitted and emphasis supplied). The courts have uniformly held that venue is not freely transferred under ERISA when the beneficiaries have filed suit. *See Securities Investor Protection Corp. v. Vigman,* 764 F.2d 1309, 1317 (9th Cir. 1985), *Varsic v. United States District Court for the Central District of California,* 607 F.2d 245, 248 (9th Cir. 1979); *Trustees of the Nat'l Asbestos Workers Pension Fund v. Lake Erie Ins.,* 688 F.Supp. 1059, 1060 (D.Md. 1988), *United States Telecom, Inc. v. Hubert,* 678 F. Supp. 1500, 1504 (D. Kan. 1987), *International Bhd of Painters v. Best Painting and Sandblasting Co.,* 621 F. Supp. 906, 907 (D.D.C. 1985), *Trustees of the Nat'l Automatic Sprinkler Indus. Pension*

Fund v. Best Automatic Fire Protection, Inc., 578 F. Supp. 94, 96 (D.Md. 1983), and *Bostic v. Ohio River Co. Basic Pension Plan*, 517 F. Supp. 627, 637 (S.D. W.Va. 1981), all denying to transfer venue at an ERISA defendant's request.

Under ERISA's venue provisions, venue is proper in South Carolina. The plan was administered here when Tru-Tech had its corporate headquarters and sales offices in South Carolina. Since Plaintiff Thomas has chosen this district as his forum, the weight of authority dictates that it not be disturbed. Moreover, maintaining this action in this forum serves the broad remedial purposes of ERISA by removing procedural obstacles from the Plaintiffs-employees suit, which the legislative history of the Act clearly mandates. Accordingly, because venue is proper in this district and the Defendants' venue analysis misconceives the law, the motion to transfer is denied.

THEREFORE, THIS COURT ORDERS, ADJUDGES, AND DECREES that the motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2) is DENIED, AND THIS COURT FURTHER ORDERS that the motion to transfer venue to the Western District of Pennsylvania pursuant to Fed.R.Civ.P. 12(b)(3) is likewise DENIED.

IT IS SO ORDERED.

/s/ William B. Traxler, Jr.
WILLIAM B. TRAXLER, JR.
United States District Judge

Greenville, South Carolina
June 23, 1992.

APPENDIX D

Filed December 2, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-2524

CA-91-3843-7-21

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs similarly situated,
Plaintiff-Appellee

v.

D. GRANT PEACOCK,
Defendant-Appellant

and

ALAN H. FINEGOLD,
Defendant

No. 93-1394

CA-91-3843-7-21

JACK L. THOMAS, Individually, on behalf of Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs similarly situated,
Plaintiff-Appellee

v.

D. GRANT PEACOCK,
Defendant-Appellant

and

ALAN H. FINEGOLD,
Defendant

No. 93-1469

CA-87-2243-7

JACK L. THOMAS, Individually, on behalf of the Tru-Tech, Incorporated Pension Plan, and as a representative of a class of plaintiffs similarly situated,
Plaintiff-Appellee

v.

TRU-TECH, INCORPORATED; D. GRANT PEACOCK,
Defendants-Appellants

and

GRANT PEACOCK & COMPANY, INCORPORATED; CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Defendants

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX E

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169 (a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

APPENDIX F

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dimissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(Added Pub.L. 101-650, Title III, § 310(a), Dec. 1, 1990, 104 Stat. 5113.)